









# Law Magazine and Review :

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# THE LAW MAGAZINE AND REVIEW.

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## I.—OUR ACTS OF PARLIAMENT.

“**I**N dealing with my subject matter,” observes Sir Courtenay Ilbert in his recent important work, *Legislative Methods and Forms*,<sup>1</sup> “I have, of course, considered myself bound by rules of official reticence; but, notwithstanding the restrictions thus imposed, I cannot help thinking that the book may be useful and interesting both to the practical legislator and to the student of political institutions”; and the observation is added that the two chapters, in which the relations between Common and Statute law are traced, and some of the most characteristic features of English Parliamentary legislation are described and explained “might even detain the eye of the general reader.” Beyond doubt, the book should be attentively studied both by legislators and lawyers, and it may be hoped that the general reader will at least glance over not only the chapters which Sir Courtenay has marked down for him, but one or two others, such as those which deal with the mode in which Government legislation is prepared, and with codification.

There could be no more apt time than the present for taking in hand the improvement in point of form both of the existing Statute Book and of those streams of legislation which are annually poured into it. We have a new Reign, a new Century, and a young Parliament; while the

<sup>1</sup> Reviewed in the May number of the LAW MAGAZINE.

second edition of the Revised Statutes has just come to an end after being brought down to the conclusion of the year 1886. Although in its retention of the archaic printing of the earlier statutes and its frequent omission of preambles, this edition shows by no means so great an improvement upon the first as might have been looked for, it forms an admirable collection for repeal, consolidation, and amendment to work upon, and its handy shape may even attract as readers some few of the working men for whose especial benefit it was designed. "In the autumn of 1886," so runs the Preface to the first of the sixteen volumes, "Mr. George Howell, M.P., addressed a letter to the Chancellor of the Exchequer calling his attention to the expediency of providing a cheap edition of the Statutes for the use of the public, and in particular for sale to public libraries accessible to working men. This letter was referred to the Statute Law Committee, who recommended the publication in a cheap form of a new edition of the Statutes. . . . With the approval and assistance of the Lord Chancellor (Lord Halsbury), and of the First Lord of the Treasury (Mr. W. H. Smith), who have taken great interest in the matter, immediate steps were taken for a further revision of the Statute Book." Additional reasons for further and increased statute law reformation are that it has become more desirable than ever that our laws should be as intelligible as possible to our Colonial fellow-subjects; that pressing reforms of substance will come rather later than sooner; and that the Government of the day is understood to command a very large majority. Then, why not with the aid of *Legislative Methods and Forms* as a text book, proceed at once to the systematic improvement of our law and our modes of legislation?

It is proposed in this article to direct attention to the improvements which appear to the writer to be most needed, but a few words must first be said of the history of

the subject, perhaps only refreshing the memory at most, but also stating in some cases what may be not so well known as it should be.

The first English Parliament was held more than six hundred years ago, and left behind it eleven "Provisions of Merton," of which three still remain unrepealed, one of the three being that which contains the celebrated refusal of all the earls and barons "with one voice" to change the laws of England, when requested by all the Bishops to consent to the legitimation by marriage of children born out of wedlock, "forsomuch as the Church accepteth such for legitimate." Since then our laws have been changed by thousands of statutes, for the most part gradually, with increasing frequency "incorporating by reference," and almost always, until the commencement of the second half of the nineteenth century, with obscurity of language in any statute itself and without sufficient repeal or consolidation of pre-existing statutes. In 1856 certain Statute Law Commissioners protested against "the confused and unsatisfactory state of our Statute Book ;" the "verbose and obscure language which by long practice had come to be considered almost essential in composing Acts of Parliament ;" the frequent uncertainty as to the extent which any proposed measure would affect the existing law ; and the confusion which arose from hasty and ill-considered amendments of a Bill in Committee. Long before this, the evils dwelt upon had been bitterly complained of by various high authorities referred to by Sir Courtenay Ilbert. Edward the Sixth, at the early age of 14, expressed the wish that "the superfluous and tedious statutes were brought into one sum together, and made more plain and short" in order that men might better understand them, "which thing," writes the boy-reformer, "shall much help to advance the profit of the Commonwealth." Both the Bacons wrote in the same strain, Sir Nicholas urging that

all the Acts be digested into titles, and Sir Francis that "all statutes which are sleeping and not of use, but yet snaring and in force," should be repealed. James the First declaimed from the throne against "divers cross and cuffling statutes, and some so penned that they may be taken in divers, yea contrary, senses." "And this reformation," said the King—a Solomon for once—"might methinks be made a worthy work, and well deserves a Parliament to be set of purpose for it." Cromwell's description of the laws of England as an "ungodly jumble" is well-known, and Pepys describes "Mr. Prin" (*sic*) as "discoursing with me on the laws of England, telling me the main faults in them; and amongst others, their obscurity through great number of Acts of Parliament, which he is about to abstract out of all of a sort, and as he lives and Parliaments come, get them put into laws, and the old Acts repealed, and then it will be a short work to know the law."

During the second half of the nineteenth century, however, enormous improvements have been effected, by the Sleeping Statutes Act of 1856, which swept away 120 entire statutes enacting such absurdities as that of 1698 to prevent the making of cloth buttons, and that of 1581 for the true melting of wax; by some 20 Statute Law Revision Acts of portentous length, expressly repealing numerous impliedly repealed Acts, and innumerable impliedly repealed portions of Acts; and by well selected consolidation Acts, such as the Criminal Law Consolidation Acts of 1861, the Public Health Act of 1875, the Municipal Corporations Act of 1882, the County Courts Act of 1888, and the gigantic Merchant Shipping Act of 1894, which in 748 sections and 22 schedules took the place of the previous consolidating Act of forty years before, and, lastly, the recent Factory Act of 1901, which (in a new and effective Parliamentary procedure to be presently described) has for the second time consolidated the Factory Acts. All these great reforms

are mainly due to a Statute Law Committee formed in 1868 by the late Earl Cairns, the members of which Committee in 1888 (at which date the first volume of the second edition of the Revised Statutes, now completed, was issued) were Lord Thring, Lord Lingen, the late Lord Bowen (then Lord Justice Bowen), Sir G. V. Rickards, Lord Welby, the late Sir Henry Jenkyns, Mr. K. H. Mackenzie, K.C., Mr. Justice Wright (then still at the Bar), and Mr. T. Digby Pigott. Besides the consolidating Acts, there have also been passed three codifying Acts (which might well have been increased to four by the passing of the late Lord Herschell's Marine Insurance Bill) throwing into single Statutes the Case as well as the Statute law relating to negotiable instruments, partnership, and sale of goods. These codes not only apply to all the three countries of the United Kingdom, but have been largely adopted in the Colonies.

But very much remains to be done. Consolidation had completely stopped between the Friendly Societies Act of 1896, and the Factory Act of the present year. Sets of Acts which pre-eminently require and perhaps may be said to be ripe for consolidation, such as the Poor Relief Acts and the Death Duties Acts, should be taken in hand at once, and the machine of consolidation (which perhaps travelled too fast in its latest decade) should be set systematically going again. It is hardly too much to say that the form of almost every Statute passed before 1850, the date of Lord Brougham's "Act for shortening the language of Acts of Parliament," since expanded into the too-little studied Interpretation Act, 1889, is radically vicious. Take, for instance, the comparatively recent Solicitors Act of 1843, itself a consolidating Act. Consider its general provisions for the non-existing "attorneys," who all became "solicitors" in 1875, its old-world and nonsensical "shall and may be lawful," and the two-page wilderness of

its 37th section, which deals with bills of costs and their taxation. Consider, too, that it has been followed by a score or so of amending Acts within the last forty years. Study the Judgments of Death Act, 1823, "for enabling Courts to abstain from pronouncing sentence of death" on any person "convicted of any 'felony, except murder, and by law excluded the benefit of clergy in respect thereof," and then compare with it the unrepealed Act of some 350 years ago, by which to steal more than a shilling's worth of goods in a Royal Palace is made a capital offence "without benefitt of clergie or sanctuarie." Incredible as it may seem, the legal result appears to be that the offender must either be hanged or let off altogether. Agricultural labourers are still, by an Act of Henry the Eighth, forbidden to play at bowls "out of Christmas"; and by a Georgian Act (treated as effective by the Friendly Societies Act of 1896), any society is still illegal which requires of its members the subscription of any declaration not required by law or not approved by justices in general sessions. There is also a curious Scots Act of early Georgian times, which disqualifies for election to a Scots seat in the House of Commons, any person who may have been twice present in the same year at divine service in any episcopal church in Scotland at which the Royal Family are not prayed for in the Church of England form. Add to these such oddities as the archaicism and confusion of the Statutes of Premunire; the nonsense of such enactments as the surviving section of the Spirits Act of 1742, and the Witchcraft Act of about the same date; the obligation upon justices to confine in the stocks (which still, according to a Murray's Guide Book of 1894, "survive in the tiny Arcadian village" of Wood Eaton, in Oxfordshire), any penniless offender against the Sunday Observance Act of 1677; the curious incompleteness of the Perjury Act of 1751, so frequently

and impliedly only incorporated in subsequent Acts and the barbarous direction of an Elizabethan Act that both the ears of a convicted perjurer, in default of payment of a fine, are to be nailed to the pillory (though the pillory itself was abolished more than 60 years ago); the complexity of the antique but necessary Forcible Entry Acts; the just provision of Magna Charta—treated as impliedly repealed for some 300 years, and marked for express repeal in an abortive Government Consolidation Bill a few years ago—preserving against defeasibility by will the rights of widows and children to their “reasonable parts;” and it will be seen at once that our doubly revised Statute Book very greatly needs a third and a more thorough revision.

The Report of the Select Parliamentary Committee of 1875, upon the possible means of improving the manner and language of current Legislation is a document of considerable importance, but the evidence taken is of more interest than the recommendations of the Committee. The witnesses included five then, or future, judges, besides the present Lord Thring, Mr. Joseph Brown, K.C., the late Mr. Reilly, and other well-known experts. “A Chinese puzzle is the only expression I can use as describing the mode in which Acts of Parliament are enacted as regards amendments,” said Sir George Jessel. “Consolidate in every case where the Acts have really become complex, difficult to handle, and difficult of construction,” recommended Vice-Chancellor Hall. “The fatal impediment to any improved practice with regard to the supervision of Bills is the question of time,” opined Mr. Justice Archibald. “This condition of the law,” urged Mr. R. S. Wright, “is a great impediment to legal science in this country. I doubt if it is anything but rare for any person, whether student or practising lawyer, or even judge, to have a systematic view of our Statutory law.” “My belief is that



both legislation and the administration of justice would be simplified by consolidation, to an extent of which you can hardly have an idea till you have seen it done," testified Mr. Fitzjames Stephen.

The main recommendations of the Committee were that consolidation should not be attempted while the law is in a state of flux; that amendments should precede consolidation; that consolidation Bills might be spread over two sessions without interruption by a prorogation; that the responsibility of correcting amendments should rest with the Government department concerned; and that a *breviate* or short statement of the law should accompany each Bill, pointing out its general intention and the effect of its particular amendments. Such a *breviate* appears to have been usual in former times; and the Committee was of opinion that it might be advantageously reverted to, "at all events in those cases where the matter is complicated, or where previous legislation to any great extent is affected by it." This valuable recommendation has been partially carried out. Perhaps about 20 per cent. of the Bills of the present day are fitted out with *breviates*—good, bad, and indifferent, but never misleading, and always better for Parliament and the public than no *breviate* at all, both in the direction of facilitating good Bills, and what is quite as important, checking the progress of bad ones. Indeed, the requirement of a *breviate* in every case might even smother a bad bill or two altogether before introduction, for when its promoters saw displayed before them in black and white the law, the mischief, and the remedy, they might possibly come to think that the remedy was worse than the disease. A Standing Order requiring such a *breviate* in every case might, with advantage, be passed by each House of Parliament forthwith.

Since the report of 1875, the subject of legislation has thrice come before the Legislature, firstly, in 1890, when a

House of Commons Committee recommended the omission of preambles from the Revised Statutes with unfortunate success; secondly, in 1892, when a Joint Committee of both Houses expressed itself satisfied with the method of the draftsmen of the Statute Law Revision Bills; and, finally, in 1895, when Lord Salisbury, then in Her late Majesty's opposition, pictured (with the assistance of the late Lord Herschell, as Lord Chancellor), the appointment of a Joint Parliamentary Committee, to consider the whole subject, and moved in the House of Lords (see Hansard, Vol. 32 of 4th series at p. 12), that "it be an instruction to the Standing Committee to insert as a schedule in every bill which refers to any sections of an Act of Parliament for the purpose of amending or repealing them, a reprint of such sections in all cases in which it can be done without an excessive increase in the bulk of the bill in question." "The motion," observed Lord Salisbury, "was intended to correct what was a great evil in our legislation. . . . The practice had grown more and more of referring in a Bill to other Acts of Parliament by way of modification and amendment, and not mentioning what the effect of that reference might be. The result was that for a man to sit down to find out what a Bill meant simply from the Bill itself, was to undertake a task as hopeless as interpreting an arrow-headed inscription." It is submitted that the breviate, recommended by the House of Commons Committee of 1875, would greatly mitigate, if not completely cure this evil.

The sittings of the Joint Parliamentary Committee (if any took place), were cut short by the Dissolution of July, 1895, and Lord Salisbury in office has not seen fit to carry out the views of Lord Salisbury in opposition. A few words upon the much abused practice of incorporation by reference may therefore well be set down here, and they cannot be better prefaced than

by the remarks of the late Lord Coleridge, and the present Mr. Justice Mathew, in giving judgment to the effect that a county elector, though registered in more than one division of the same county, may vote in one division only.<sup>1</sup> "We have arrived at this conclusion," observed those learned Judges in a considered judgment, "with some difficulty, though without doubt. The difficulty has arisen, not from anything inherent in the subject itself, which is simple enough, and might be quite simply treated, but from the mode of legislation now usual in these matters. Sometimes whole Acts of Parliament, sometimes groups of Clauses of Acts of Parliament, entirely or partially, sometimes portions of Clauses are incorporated into later Acts, so that the interpreter has to keep under his eye, or if he can, bear in his mind, large masses of bygone and not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statute into which they are incorporated; so that you have first to ascertain the meaning of a statute by reference to other statutes, and then to ascertain whether the earlier Acts qualify only or absolutely contradict the later ones. . . . It has indeed been suggested that to legislate in this fashion, *keeping Parliament, in truth, in ignorance, of what it is about,*<sup>2</sup> is the only way in which at the present day legislation is possible. We know not whether the suggestion is correct; what we do know is that the procedure makes the interpretation of modern Acts of Parliament a very difficult, and sometimes doubtful matter. . . . We are well aware that protest as to past legislation is unavailing,

<sup>1</sup> In *Knill v. Towse* (1889) 24 Q.B.D. at p. 192, in connection with the construction of the Local Government Act, 1888, as read with the Municipal Corporations Act, 1882.

<sup>2</sup> The italics are the present writer's.

but for the future to draw attention to a plain evil may perhaps be the first step towards its remedy." In two instances at least this protest was shown within a very few years, to be as ineffective as it was, from its generality, significant and pointed. The Finance Act of 1894 subjects to estate duty, gifts within 12 months of death, and the Land Transfer Act of 1897 names particular areas for its operation. In each case incorporation by reference is relied on for effecting one of the main objects of the Act. The practice complained of, however, is by no means of modern growth, but is nearly as old as Parliament itself, and is peculiarly the vice of ecclesiastical legislation. It is by this mode of law-making that a Bishop Suffragan exceeding his jurisdiction still forfeits all his property to the Crown (and for a long period of years might have been knocked on the head wherever found); that heretics were burnt to death in the reign of Philip and Mary by virtue of an Act which itself did not even mention by name any punishment whatever; and that the Royal Declaration against Transubstantiation is directed to be made at the commencement of every reign, the Declaration itself occurring in a repealed Act of Charles the Second, and the obligation to make it being imposed upon the Sovereign both by the Bill of Rights and Act of Settlement. Perhaps the worst recent instance in a purely secular Act, in addition to those provided by the Finance Act and Land Transfer Act as mentioned above, is afforded by the 7th section of the Judicature Act, 1884, which empowers judges of County Courts to act as Judges of Assize by enacting that "Judges of County Courts shall have every qualification conferred on Her Majesty's Counsel learned in the law by the Act of the thirteenth and fourteenth Victoria chapter twenty-five"—an Act repealed (by the Statute Law Revision Act, 1875) nearly ten years before its incorporation, and the provision of the Act of 1884 being

now happily superseded by the plainer words of the County Courts Act, 1888. But what is to be done? Some incorporation by reference there must always be; and to be able to incorporate the Land's Clauses Acts or the Summary Jurisdiction Acts by a very few words is an aid to legislation rather than a drag upon it. To provide a complete remedy is difficult and to describe it (even if it could be designed) would occupy far too much space here. Four rules may, however, be suggested with some confidence. On no account should the practice be resorted to for the purpose of disguising important alterations of the law; the incorporation should be confined to procedure and not touch substance; no enactment of a date prior to 1850 should be incorporated; and no section should be incorporated in part only. It should always be remembered also that there are two entirely different sets of persons to be considered; firstly, the legislator in connection with the Bill in its passage through Parliament; and secondly, the judge, the lawyer, and the public in connection with the Act when passed.

One improvement in legislation which cannot be too highly recommended, and which, rather curiously, does not appear to be noticed by Sir Courtenay Ilbert, is that adopted in the years 1889 and 1890 in connection with Lunacy Law amendment and consolidation, and in the year 1894 in connection with the Prevention of Cruelty to Children. In each of these cases an amending Act was passed but directed not to come into force for a considerable period, at the expiration of which was passed a Consolidation Act repealing but incorporating it. Thus the Lunacy Acts Amendment Act containing 94 sections received the Royal Assent in the August of that year, but was directed not to come into effect until the 1st day of May, 1890, on which day the Consolidating Act of the next session containing 342 sections including those

of the Act of 1889, having received the Royal Assent in the previous March was afterwards directed to come into effect. By this procedure the convenience of both legislators and lawyers is consulted in the best manner possible. Analogous and perhaps preferable to it is the procedure for passing the recent Factory Act by means of separate amending and consolidating Bills, afterwards fused into one by the same committee in the same session.

An alteration is greatly wanted in respect of the date of the commencement of Acts. Caligula, so says Dio Cassius, was so eager to punish the Romans for breaches of the law that he wrote his Acts in very small characters, and hung them up on high pillars "the more easily to ensnare the people." Do not our two rules, that ignorance of the law excuses no man, and that an Act of Parliament comes into operation on the day of the Royal Assent, come very much to the same thing? To print a statute takes some time; to understand it in most cases a much longer time. Exceptions to the rule are no doubt common—January the first after the date of passing being the day fixed for the commencement of the Companies Act, the Burials Act, and the Agricultural Holdings Act of 1900, and of the Factory Act, the Youthful Offenders' Act, the Sale of Liquors to Children Act, and the Public Libraries Act of 1901. But is it not high time for Parliament to direct that, except as expressly excepted, no statute shall come into operation until at least two months have elapsed? Or would it be more convenient that all Acts should come into operation on the same New Year's Day after passing?

How about preambles? "*Quantum potest fieri, prologi evitentur, et lex incipiat a jussione,*" wrote Lord Bacon, and both the House of Commons Committee of 1890, and our high officials since, have shown great distaste for preambles, not being content with omitting them in Govern-

ment Bills, but with the assistance of Parliament in Statute Law Revision Bills repealing them where they are already to be found, and printing "Revised Statutes" without them. It is conceived that this has been done from motives of economy, for though many existing preambles may be useless, many (such as that of the Copyright Act, 1842) are useful, none can be harmful, and almost all have a historical interest, such as that of the Tudor Statute of Appeals. The long preambles of early date (such as that of the first Act of the Irish Parliament of Charles the First which gives in many pages the whole history of the lamentable disturbances which led up to it) would no doubt be quite out of place at the present day, but there must have been a reason for passing every Act, and it is well to place it in the forefront of the Act itself. The best mode of doing this would be to transfer the *breviate* in a much abbreviated form to the beginning of both Bill and Act as a preamble. A simple reform like this would render each of these documents more intelligible to legislators, lawyers, and laymen (and perhaps even to draftsmen themselves who would have to begin their work with a short *pièce justificative*) than they are at present. Do what you will you cannot make Bills and Acts easy to understand, though it would be no hard matter to make them more intelligible.

Another point in legislation which requires consideration is the temporary character of some of our most important statutes. Temporary legislation has long been well-known to the Statute Book, and both the Statute of Frauds and the Statute of Distributions were only temporary in the first instance. But for some forty years a general statute called the Expiring Laws Continuance Act, has been annually passed. The first of these, passed in 1863, contained only 13 statutes; that passed in 1901 contains nearly a hundred, amongst them being the Poor Rate Exemption Act, 1840, so important in connection with the

Agricultural Rates Act, and other Acts just continued until 1904, the Ballot Act of 1872, the Militia (Ballot Suspension) Act of 1865, the Sunday Observation Prosecution Act of 1871, all the Corrupt Practices Acts, a very curious Promissory Notes Act of 1863, allowing cheques to be drawn for amounts between twenty shillings and five pounds, and the Employers' Liability Act, 1880. Surely the time has come for Parliament, in the case of the large majority of these Acts, either to perpetuate or discard them.

A matter more for the public and for lawyers to deal with than for Parliament, is the use of Short Titles. The late Sir James Stephen, in giving evidence before the Committee of 1875, said "it would be an unspeakable comfort in a small way if anybody was commissioned to compose a set of small and intelligent titles for passed Acts." Since then more than 2,000 short titles have been added to those already existing, which had gradually increased since their first creation in 1845, and now every Act passed has a short title given to it. But neither in text books nor public documents are short titles as much used as they ought to be. Very frequently, for instance, do we read of 22 & 23 Vict. c. 35 instead of the Law of Property Amendment Act, 1859; of 20 & 21 Vict. c. 43 instead of the Summary Jurisdiction Act, 1857, and of 7 & 8 Vict. c. 32 instead of the Bank Charter Act, 1844. The Statute Law Revisors have set a good example in substituting short titles for regnal years and chapters in the second edition of the Statutes Revised. The combination in citation of both short title and regnal year and chapter is frequently desirable.

The following summary of Suggestions is now submitted :—

(1) Pass another Sleeping Statutes Act like that of 1856 to repeal enactments of a similar kind to those repealed by that Act.

(2) Take up again, and take up systematically, the con-



consolidation which ceased between 1896 and 1901, and begin by consolidating the Acts of Parliament Acts, the Burial Acts, the Death Duties Acts, the Poor Relief Acts (with a schedule of Poor Law Orders), the Solicitors Acts, the Public Health Acts, and the Summary Jurisdiction Acts, with a schedule containing Summary Jurisdiction Rules. All these sets of statutes needed consolidation much more than the Factory Acts did.

(3) Prefix a Breviate to each Bill, pointing out the existing law, the mischief caused by it, and the remedy proposed.

(4) Abbreviate this Breviate for the purpose of a Preamble in every case.

(5) Place interpretation clauses at the beginning of an Act (as in the case of the Public Health Act of 1875) instead of at the end of it.

(6) Postpone the commencement of every Act (except as expressly excepted) to the expiration of a reasonable and uniform period.

(7) Print all statutory rules as a schedule to each Act requiring them, giving Government Departments power to alter them, but not to make them in the first instance.

(8) Re-appoint (with enlarged powers of enquiry) the Joint Parliamentary Committee on referential legislation, the appointment of which was rendered fruitless by the Dissolution of July, 1895.

(9) Take up and pass the late Lord Herschell's Marine Insurance Bill (re-introduced in the late session, it is pleasing to note, by the present Lord Chancellor) and codify, as well as consolidate. "The best argument for codification is to be found" (see Journal of the Society of Comparative Legislation, at p. 141 of the June number of the present year) "in its general adoption by civilised nations. France, Germany, Austria, Hungary, Switzerland, Belgium, Spain, and Portugal have all their

codes, more or less complete. . . . Canada, New South Wales, Victoria, New Zealand, and Queensland have Criminal Codes. And England? It stands aloof in inglorious isolation."

It is also well worthy of consideration whether the plan which was adopted in the case of the Local Government Act, 1894—of terminating a session by adjournment rather than by prorogation—could usefully, and without unduly trenching on the Royal Prerogative, become the rule rather than the exception. The arguments for this plan, and the weight of the authority in its favour, may be fully seen in a recent letter to the *Times*, dated Chamonix, August 24th, and signed "Edmund K. Blyth."

The Statutes of 1901—the Civil List Act, the Demise of the Crown Act, the Public Libraries Act, the Larceny Act, the Youthful Offenders' Act, and the Expiring Laws Continuance Act—although few and mostly insignificant from the foregoing point of view, require some short notice in connection with it.

The Civil List Act leans upon incorporations by reference of the Civil List Act of 1837 for its two main enactments—that providing for the King's surrender of the hereditary revenues of the Crown, and that which places restrictions upon Civil List Pensions, and the Youthful Offenders' Act bristles with incorporations by reference.

The Demise of the Crown Act does its necessary work in one short section neatly enough, but contains no mention of the Acts of Anne and other Acts preceding it, which ought to have been expressly repealed, or so far as desirable (if at all) expressly incorporated in modern phraseology.

The Factory Act stands out as a great legislative achievement in point of form, by starting a new procedure of firstly amending, secondly consolidating, and thirdly

fusing by three separate steps in one session, but its interpretation clause ought to have been placed at the beginning instead of at the end of it, and the interpretation of "owner" ought to have been expressed, instead of being borrowed from the Public Health Act by an incorporation by reference.

The Public Libraries Act has a curious slip in its title inasmuch as it professes to "regulate the liability of the Managers of libraries for libel," in addition to generally amending the Public Libraries Acts, whereas in the body of the Act no provision for regulating the liability for libel can be found.

The Larceny Act, by its complete repeal and re-enactment, with the desired amendments of the 75th and 76th sections of the Larceny Act, 1861, for which it is substituted (thus much improving upon the incomplete and unpassed measure of last session, which could not have been understood without reference to the Act of 1861 itself) will, it is hoped, be a sufficient deterrent to those persons (if any) who may meditate the misappropriation of property entrusted to them for investment, whether the directions may have been given in writing or not.

Lastly, the further continuation of the Agricultural Rates Act, and other Acts, by a separate Act, unhappily stereotypes the temporary character of the Poor Rate Exemptions Act, continued by the Expiring Laws Continuance Act, and the law of rating as affecting personal property, which led to the passing of the first temporary Exemption Act, some 60 years ago.

J. M. LELY.

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## II.—THE OBJECTS AND SCOPE OF THE CRIMINAL LAW.

I DO not propose in this article to inquire into the origin of the Criminal law in this or any other country, or the ends at which it actually aims. I only seek to deal with the objects at which it ought to aim, and the best mode of effecting these objects. For this reason I am careful to avoid using such a title as "The Theory of Punishment," adopted by Sir Edward Fry, in his recent volume, *Studies By The Way*. The State is not the only source of punishment. Parents, guardians, and teachers punish children. Society has punishments which are often keenly felt by those on whom they are inflicted. Religious Sects, and, indeed, Societies and Corporations of all kinds, usually have punishments also. To inquire into the origin and rationale of punishment in general would open up a very wide question, and one quite distinct from that which I propose to discuss. For before we proceed to consider the Theory of Punishment, *as inflicted by the State*, we have two preliminary questions to answer, namely, Is the State bound to punish at all? and, if so, why?

"On what ground," asks Sir Edward Fry, "do we punish people at all when they do wrong?" This, he says, is "the primary question in the theory of punishment." Perhaps it is; but it is not the primary question in dealing with the objects and scope of the Criminal law. The Criminal law does not seek to punish every one who does wrong. It leaves a great many wrongful acts unpunished so far as the State is concerned, and it often allows other persons to punish these acts, provided that they do so in a reasonable and moderate manner. Consequently the existing Criminal law is not based on Sir Edward Fry's fundamental principle—our natural sense of the fitness of associating sin or wickedness with suffering and the gratification of this

natural feeling in the punishment of those who deserve it.<sup>1</sup> The State is not bound to provide at the public expense the means of gratifying all our natural feelings, and not being bound to undertake this task, it is wise in not attempting it; and if the State does sometimes provide public amusements, the distinction between these amusements and the administration of the Criminal law is a wide one. It was less so in former times, when all kinds of corporal punishments, from hanging and burning, down to the stocks and the ducking-stool, were carried out in public. But the gratification of the pleasure which some persons feel in witnessing or meditating on the sufferings of the guilty ought never to have formed the basis of the Criminal law. There is, I apprehend, no obligation cast upon the State to punish merely for the sake of punishing. Punishment, so far as the State is concerned, is a means not an end. That end—the great end of all State legislation—is the public good. The State in its Criminal law should merely aim at the public good and employ punishment only in so far as it is conducive to that end. This has been well stated by the late Sir John Bridge, as cited by Dr. Anderson in one of his recent articles in the *Nineteenth Century*. His duty, he said, was not to punish. That belonged to a higher power. His task was only to protect the community. Dr. Anderson (who goes out of his way to attack the “Humanity-mongers”) fully adopts this view, and contends that punishment is used by the State as a means, not as an end, and ought to be dispensed with whenever the desired end can be best attained without punishment, as seems to be the case with releases under the First Offenders’ Act. Indeed this Act and other similar provisions in our Statutes seem inconsistent with the theory of punishment laid down by Sir

<sup>1</sup> This principle is also adopted to a considerable extent by Sir W. R. R. Kennedy, whose views the same remarks will, I think, be found applicable.

Edward Fry and others. One illustration given by Sir Edward Fry seems to me to tell strongly against himself—that of the Quarantine. Here innocent persons are often exposed to a good deal of inconvenience and suffering for the public safety. “No one,” remarks Sir Edward Fry, “would call this *punishment*.” Be it so. It follows that when punishment is not available for the protection of the public, the State must adopt some other mode of protection, and may legitimately adopt a mode which involves as much suffering and inconvenience as many of the minor punishments in our Criminal Code. The safety of the public—the protection of the lives, liberties and properties of its subjects—is the end of this branch of State legislation. It uses (or at least ought to use) punishment so far as it is conducive to this end, but no farther. And when punishment—the infliction of suffering on the guilty is insufficient to provide for the public safety, we have to take a step in advance and attain our object by inflicting suffering on the innocent. The punishment of the guilty is thus neither always necessary for the public safety nor always sufficient for this purpose. Wrong-doing and the infliction of suffering by the State are not coincident in extent, nor does the domain of one include that of the other, and very few persons would now propose to render their spheres absolutely coincident.

The duty of the State is to protect the lives, liberties and properties of all its subjects, wrong-doers as well as right-doers. This, in general terms, is admitted. I am not permitted to rob a man because he has committed murder, or to kill him because he is a pickpocket. The only justification for any interference on the part of the State with a man's life, liberty or property (as Bishop Butler expresses it in the Sermons, which Sir Edward Fry rightly describes as profound) is that a more general and enlarged obligation frees us from a more particular and

confined obligation of the same kind which is inconsistent with it. If in order to protect the lives, liberties and properties of the community, it becomes necessary to interfere with the life, liberty or property of a certain individual, then, and then only, is the State warranted in interfering with it; and this interference should always be limited to what is absolutely necessary for the protection of the public. Punishing a man merely because he deserves it and without having any good object in view is not only unworthy of the Legislature but, in the opinion of Butler, unworthy of a Moralist or a Christian. The natural feeling of resentment or indignation which is gratified by the suffering of the wrong-doer is one which Butler contends ought never to be gratified unless we have some good end in view. The abuse of "deliberate resentment" (under which phrase he includes the indignation which we feel at an injury done to another) on which he lays most stress is "When pain or harm of any kind is inflicted merely in consequence of and to gratify that resentment, though naturally raised." And though Butler is speaking here chiefly of a private exercise of resentment, he has elsewhere stated that the object of punishment inflicted by the State is merely "to prevent future mischief." I have referred to Butler not only on account of his general celebrity as a moralist but in order to show that the theory of the Criminal law which I am advocating did not originate with Bentham and the Utilitarian School, and is quite independent of that system.

We do not punish all wrong-doing, because the protection of the public does not require us to do so. I have already referred to the cases in which a sufficient check is placed on wrong-doing by the punishments inflicted by parents, guardians, and others, or by the ostracism of Society. In other cases the remedy provided by the Civil law is sufficient to repress wrong-doing without invoking

the aid of the Criminal Code. Our Civil Courts deal every day with cases of wrong-doing. Torts imply wrong-doing in their very designation. Every wilful breach of a fair contract is also an instance of wrong-doing. Fraud, undue influence, unfair advantage, etc., are kinds of wrong-doing constantly before our Civil Tribunals. Reparation is here the primary object of the law, and reparation is not punishment. If I borrow £100, it is no punishment to compel me to repay it ; and if I have also to pay costs, this is the consequence of refusal to pay, and perhaps of unsuccessful litigation on my part. Reparation may, however, be included under the general head of the protection of the public. If it were possible, by a system of legislation, to provide that everything that was stolen should be promptly restored, the public would be practically protected against robbery, and no punishment for that offence (unaccompanied by violence, or some other crime) would be required. I speak, of course, of reparation by the wrong-doer. Reparation by the public would merely spread the injury over the entire community, and would tend rather to promote than to repress theft, for a man would not be restrained from stealing by considerations of gratitude or compassion if he knew that his crime would do no harm to the immediate victim. It is not requisite, nor, I think, desirable, for the safety of the public, that the community should resolve itself into a Mutual Insurance Society as regards property.

The limits, however, which separate the Civil from the Criminal law are somewhat narrow. For what are we to do when the man who has been ordered to make reparation does not make it ? We resort, not merely to a seizure of his goods, but to imprisonment, or, in some other case of a similar kind, to fines, both of which are ordinary recognised forms of punishment. The Civil Court punishes disobedience to its orders in this manner without calling



in the aid of the Criminal Courts, and it would often fail in its task of procuring reparation for the injured if it did not possess this power. But contempt of Court is not regarded as a crime, nor is the person who commits it considered a criminal; and he can usually obtain a release by doing what he was ordered to do. On the other hand, under the existing Criminal law, persons who are subsequently acquitted are often imprisoned for safe custody while awaiting trial. Whether this is to be called punishment or not is a question of words; but, undoubtedly, if a convicted prisoner were treated in the same manner it would be called punishment. And in case of a subsequent conviction, many judges, though not all, take this previous imprisonment into consideration, and treat it as a punishment already inflicted. Here, again, the protection of the public is the guiding principle of the Criminal law. It is often necessary for the public safety that a person accused of a serious crime on strong *primâ facie* evidence should not be left at large to abscond and defeat the ends of justice before arrangements can be made for giving him a full and fair trial.

The province of the Criminal law, I apprehend, is the following. There are forms of wrong-doing against which the public requires to be protected and against which neither parental authority, social ostracism, nor the reparation enforced by the Civil law afford adequate protection. It is, therefore, necessary for the State to institute pains and penalties as punishments for these misdeeds, and to inflict them on persons convicted of them on satisfactory evidence<sup>1</sup>. But as the State should interfere as little as possible with the lives, liberties and properties of its subjects, and should aim at the good of all, these pains and penalties

<sup>1</sup> And it is often necessary for the State to punish persons who disobey the laws, although the act involves little or no moral turpitude. The act is only wrong because prohibited.

should always assume the most lenient form that will afford adequate protection to the public. Such protection can never be absolute. No possible system of punishments will wholly prevent crime. Take murder, for example. It is often committed in a state of such passion and excitement that the criminal does not think at all of the consequences of the act until it is done. Again, murder is often committed by a man who shows how little he fears the heaviest penalty—death—by committing or trying to commit suicide immediately afterwards; or else by a man who thinks he has laid his plans so skilfully that there is no real risk of the crime being brought home to him. None of these persons will be deterred from committing murder by any penalty that the Legislature can attach to it. And the same remark applies to other crimes. When a man was liable to be hanged for stealing a small sum, many persons were found who stole small sums and risked the penalty. Nor is it true that the deterrent effect of punishment is proportioned to its severity. The great severity of the punishment which the law formerly enjoined often made those who could give damaging information unwilling to give it, and jurors unwilling to convict; and if picking pockets were made a capital crime, I do not think that the Counsel for the Crown would press strongly for a conviction, or that the Judge would sum up decidedly against the prisoner. Any attempt to carry out such a sentence at the present day, moreover, would array public opinion against the administration of justice and enlist the sympathies of the people on the side of the prisoner. Many persons would rather put up with a slight injury than bring a very heavy penalty on the person who committed it. The severity of punishment would thus often interfere with its certainty, and it is not without good reason that jurists have laid down that it is not the severity but the certainty of punishment that deters. A certainty

of three months' imprisonment may prove a more effectual deterrent than a chance of ten years' penal servitude, especially if the criminal is of a sanguine temperament.

It is not indeed to the Criminal law that we are to look for this certainty of punishment. That depends chiefly on the efficiency of the police, the Crown counsel and solicitors and the magistrates and judges, together with the intelligence and fairness of the jurors and the willingness of the public to assist in bringing criminals to justice. This enumeration is sufficient to show that with the advance of civilisation and the better general government of the country the punishment of the guilty will become more and more certain; and with the growth of this element of certainty that of severity may be allowed to fall more and more into the background. Our own experience confirms this. The former severity of our penal code has been largely moderated and the process is still going on, not so much in consequence of changes in the Statute law as by the administration of that law in a more merciful spirit. But though there probably never was a time when our punishments were more lenient than at present, the public was never better protected. The improvement in sentences must be admitted, but I believe that it has not been carried to its legitimate extent or even nearly approached what it ought to be; and that the main reason why we are in this respect behind some other countries is to be found in the erroneous views as to the object of the criminal law held even by eminent Judges and Legislators. We are still infected with the heresy of vindictive punishment—the heresy which holds that it is right to hate criminals and that our punishments are meant to express our hatred of them<sup>1</sup>, which places the *lex talionis* above the Sermon on the Mount, seeks to punish every man who deserves

<sup>1</sup>These are, I think, very nearly the words of the late Sir J. F. Stephen.

punishment in exact proportion to his ill-deserts, regards justice as synonymous with retribution, and advocates the wreaking of what is called righteous indignation or righteous vengeance on the wrong-doer, utterly regardless of whether any good will result from it, or even whether it may not do harm. This heresy, besides leading to excessive punishments, leads to great inequality in punishing. For when we lose the flickering light of the *lex talionis* (which is only applicable to a comparatively small number of crimes) no two Judges are likely to agree as to what a particular prisoner deserves. The task is, in fact, to find what amount of physical suffering is equivalent to a given amount of moral turpitude, and I know no principle on which this equivalence can be determined. Moreover, no two Judges would probably agree either as to the degree of moral turpitude in the offender or the amount of suffering resulting from the sentence, in any given case. Other judges seem to avoid this inequality of sentences by not troubling themselves about principles but passing in each instance the sentence which they regard as most in accordance with the ordinary practice. Such judges are, however, an obstacle to any forward movement. They are but passengers in the boat which progressive judges have to row.

But are these evils removed by adopting what I regard as the true principles of Criminal legislation? May not judges differ as to what is necessary for the protection of the public and pass very unequal (and sometimes either excessive or unduly lenient) sentences in consequence? The reply, I apprehend, is that we are here on the ground of experience—of statistics. Experience can never tell us what a man deserves, but it can tell us what is necessary to deter him and others from committing crimes. The experience of other countries is often valuable in this

respect and should never be neglected ; but it will perhaps be best to start with our own Criminal system as we find it. This system has been gradually becoming more lenient, notwithstanding which, crime has, on the whole, continued to diminish. Can this process be safely carried further ? The answer is, Try : and the experience of other countries encourages us to make the attempt. But we should not make violent changes which may lead to a revulsion, with the result of temporarily increasing crime and retarding progress. Let the administration of the law gradually become more lenient, and watch the consequences. When crime begins to increase, "stop—at least unless the outbreak seems to be plainly attributable to other causes—but if crime continues to decrease or even stands still, go on. We have not reached the irreducible minimum of punishment and our duty is to go on until we reach it.

Let us apply these remarks to capital punishment for murder. The experience of other countries suggests that capital punishment for murder is not necessary in order to protect the public, or at least that the number of executions might be largely reduced while still practically affording as much protection as at present. Our own experience with regard to the other crimes which were once punishable by death leads to the same conclusion. Moreover, we at present commute the death-sentence passed on a considerable number of persons convicted of murder, and these commutations do not seem to have led to an increased number of murders. Why not, then, carry the commutation system further, reserving the death-penalty for the more aggravated forms of the crime, and try whether the result will be an increased number of murders ? The Home Secretary could do this without any change in the existing law, and if the statistics of crime indicated that he was going too fast, he could stop, and even retrace his

steps, while the law remained the same throughout. On the other hand, if he found that he could safely proceed, capital punishment for murder might, for all practical purposes, be abolished before an Act for its formal extinction was passed by Parliament. This course was, indeed, to a large extent, adopted in the case of the other crimes which were formerly capital. The final abolition of capital punishment for these crimes involved no sudden or violent change. For many years previously, the commutations had largely exceeded the executions.

We punish past crimes in order to prevent future crimes. But what if the man who has been punished shows that he has not been deterred, by committing the same crime again and again? Has not our system of punishment failed with him, and must we not try something more severe? To these questions the answer is that the main object of punishment is to deter *other* people from committing the same offence. A man feels a strong temptation to commit some particular crime. He would commit it if he thought that he could do so with impunity, but he is deterred by the prospect of prosecution, conviction, and punishment. The number of persons who are deterred in this manner from committing crime is probably much greater than the number of actual criminals, and the punishment which has failed to deter a criminal from repeating his crime may, nevertheless, have proved of great public utility by deterring others. Public utility also requires that the criminal should be punished whenever the offence is repeated; for if a single punishment insured immunity for the future, the deterrent effect of it would be much diminished. But it is not the duty of the State to afford the public complete protection against any particular offender, and, with regard to the habitual criminal, I believe it will be found that seven years' penal servitude is usually quite as inefficacious as three months'

imprisonment. He is, moreover, often a petty depredator, who may be more expensive to the public when in prison than when out of it—a sufficient reason for not locking him up for life. Few persons would now propose to hang him, and, as regards this class of criminals, it is not easy to see how our present system can be materially improved. I do not, however, regard it as perfect with regard to any class of offenders.

The object of our Criminal law, and of our Prison System, is not to reform but to deter, and it is not easy to combine punishment with reformation, because the punisher and the punished are never likely to be on the friendly terms which should always exist between the would-be reformer and those whom he seeks to reform. Consequently, to treat a man as irreclaimable because he has not been reformed by punishment under our present system is absurd. But while we cannot turn our prisons into Reformatories without ceasing to make them places of punishment, we might, at all events, give free admission to reformatory agencies. Prison Gate Missions have admittedly done much good. Why keep them outside the gate? Why not let them in? And I think they might also be subsidised by the State. The mere loneliness of the prisoner's condition might make their agents acceptable visitors. Further, habitual crime is, I believe, often the result of inability on the part of the criminal to earn an honest living. The difficulty of earning an honest livelihood which often prompts the first crime is always increased after one conviction and punishment, and is further increased after two or three; and as the unthinking public is apt to measure the gravity of the crime by the severity of the sentence, the judge who "makes an example" of an offender may not improbably make an "habitual" of him. As to this difficulty of earning an honest living, I do not see why a prisoner should not be taught while in prison to earn his bread. Such teaching

is quite consistent with punishment, and would make prison labour more remunerative than at present. And untried prisoners might be invited to take their turn at this labour and be paid the value of their work. Labour is a recognised part of the prisoner's punishment; but very little trouble is taken to render it either remunerative at the time or useful to him afterwards. I have no faith in heroic remedies for habitual offenders.

It will be seen that, according to the foregoing views, it is rather by improvements in the administration of justice than by changes in the Criminal law that the cause of progress and humanity will be best promoted. And our Criminal Code is well suited for this purpose, for in almost every case it gives a wide discretion to the judge, and in every case it gives this discretion (as far as reduction is concerned) to the Home Secretary. But it is nevertheless desirable that the Criminal law should keep abreast of the administrative progress, and that penalties which have fallen into disuse without any ill result should be removed from the Statute Book. There are kinds of murder which we no longer punish with death, and the change does not seem to have had any bad consequences. Such murders are those of a new-born child by its mother, and causing the death of a woman by an illegal operation. It would be very desirable to pass an Act of Parliament abolishing the death-penalty in such cases as these, where its only effect at present appears to be to increase the difficulty of obtaining a conviction.

Again, no person is now kept in penal servitude for life, provided that he lives long enough. A Statute providing that penal servitude should always in future be passed for a term of years, not exceeding twenty, would do little more than give the formal sanction of the Legislature to a practice already in existence; (but I think that the new Statute might reduce the limit to fifteen years.) Again, as



sentences have, on the average, been shortened during the last forty years without any resulting increase of crime, the time seems to have come when the maximum penalty for all (or almost all) crimes might be advantageously reduced by Statute. I need hardly say that when a Statute allows a wide range of penalties, the graver penalties were only intended to be resorted to in aggravated cases, and the same remark applies to Statutes which allow whipping (for instance) to be *added* to imprisonment or penal servitude at the discretion of the Court. What is described in the Statute as an addition is evidently not regarded as an ordinary penalty, and if Criminal Statistics do not establish the value of the addition, we might reduce the maximum of punishment by striking it out.

A popular objection to the Protective or Preventive theory of Criminal Legislation is that if the main object of punishment is to deter others from committing crime, this object can be as well promoted by the punishment of an innocent as of a guilty person, provided that there is a general belief in his guilt. This is true; and I quite agree that it is useless and wrong to punish a person because the administrator of justice thinks him guilty if he cannot convince the public of his guilt. That we inflict suffering and inconvenience on persons whom we know to be innocent, for the protection of the public, has been already remarked; and as our Criminal Courts are not infallible—and I believe their mistakes are more numerous than is commonly supposed—we often punish innocent persons in the belief that they are guilty, and these punishments are useful in deterring other persons from committing crime. But the objection is often made as if, on this Preventive theory, the administrator of justice would be warranted in punishing a person whom he *knew* to be innocent (or of whose guilt he had grave doubts), provided that by any amount of *suppressio veri* and *suggestio*

*falsi* he could persuade the public of the prisoner's guilt. This would be doing evil that good might come, and the anticipated good would not come. Such punishment would evidently miss one of the ends of State punishment—that of deterring the prisoner from repeating the crime. But it would do more than this. Supposing the crime to be a real one, the punishment of every innocent man involves the escape of a guilty one. His impunity would form an inducement to him to repeat the offence and he would perhaps use it also as an inducement to his associates as showing how easily the administrators of justice could be hood-winked and put on a false scent. Moreover, if the practice were adopted on anything like an extensive scale, it would defeat its supposed object of contributing to the public good. A successful deception could not be carried on for an indefinite period. The real criminal would confess or be detected by some accident, or else some unexpected event would clear the convict of the offence. Then the public would demand why the truth had not been discovered by the administrators of justice at an earlier date, and it would be found that the facts were really known to them, but had been kept back from the public because they knew that a release must inevitably result from the publication. No Home Secretary would, I think, avow that he had punished an innocent man with full knowledge of his innocence because he thought it would be for the good of the public to punish him; but if it were once discovered, whether by admission or in spite of denial, that this had been done, the public would lose all faith in the administration of justice and insist on the liberation of numbers of guilty persons, because the affirmance of convictions by the Home Secretary would be regarded as absolutely worthless. A tribunal of ultimate appeal which punished the innocent, knowing them to be so, or even knowing that there were grave doubts as to their guilt

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would be indeed "a mockery, a delusion, and a snare." As soon as its real character became known its doom would be sealed. I trust that the Home Office has never acted upon this principle. Owing to the secrecy of its procedure, however, which is carried far beyond what (so far as the public is concerned) is either necessary or expedient, it is often impossible to state on what principle the Home Secretary has acted in a given case; and I fear there are instances in the past in which the occupant of the post has not only punished persons whose guilt he regarded as doubtful, but intentionally concealed his doubts and the grounds of them from the public. I am not discussing the question whether an appellate tribunal in Criminal, as well as in Civil, cases may not affirm a decision of the Court below with which it is not altogether satisfied; but in such cases the appellate tribunal should inform the public of the real facts, and intimate that but for its respect for the Court below and its unwillingness to reverse its decisions, it might have taken a different view of the merits. The public could then consider whether or not it was desirable that the appellate tribunal in Criminal cases should take a more independent line and re-hear cases of this kind without prejudice or prepossession. At present there is no department of our administration respecting the merits or demerits of which the public possesses so little real knowledge as that which finally decides questions of life and death. There is a general tendency on the part of the officials of all Departments to try to persuade the people that everything is going on right, though some of them may have a shrewd suspicion that this is not the case; and the more secrecy is observed in any Department, the greater is this tendency, because facts that are kept back from the public cannot be used to refute the self-glorification of the officials; and I may add that a subordinate official could not venture to point out defects which

his superiors were anxious to conceal. The Home Secretary is a responsible public officer. He should take the public into his confidence and justify his decisions on rational grounds, instead of asking the public to trust him in everything, although he refuses to explain anything. He is the only public officer who is permitted to assume this attitude, and it is only in the Criminal Department that he assumes it. The sooner this anomaly is put an end to, the better it will be for everyone concerned; but if the Home Office sometimes does evil, I believe it is not "that good may come," but that precedent and routine may not be departed from; for with a secret tribunal these can easily take the place of principles and obviate any consideration of the latter. A man who is bound to give reasons for his decisions must consider principles, and adopt those which commend themselves to his own judgment; but a man who is not bound to give any reasons may disregard principles and give decisions into which what scientists designate "personal equation" enters largely<sup>1</sup>. Indeed, persons who are by no means hostile to the Home Office have frequently asserted (without contradiction) that the existence or non-existence of agitation in favour of a prisoner affects the view which the officials take as to the weight which should be given to the doubts which exist in his case. Tossing up for a decision would be a more satisfactory course than basing it on such a ground as this; and the fact that this ground has often been alleged in the Press, without disapproval, shows how far the true principles of Criminal Legislation have hitherto failed to take hold of the public mind. In this, as in many other instances, "We must educate our masters." Here, how-

<sup>1</sup> See an article by X.Y.Z. in the *Fortnightly Review* for September, 1899. It appears to be written by a Home Office official. Can any competent jurist regard the practice described by him as satisfactory? The misuse of the word *mercy* seems to have much to answer for.

ever, the reformer has to go a step farther. He has to teach the public that *they* are the masters and that the Home Secretary and his subordinates are their servants—servants bound to satisfy them as to the proper performance of the important duties with which they have been entrusted. And if the manner in which these duties are performed is not altogether satisfactory, the public should consider whether they are not themselves to blame for not having given proper instruction to their servants and seen that these instructions were carried out. It is absurd to control the King's prerogative of Pardon while leaving the Home Secretary uncontrolled. But the application of the term *pardon* to every decision in favour of a prisoner on an appeal relating to the facts is simply misleading. Its origin is to be found in history, not in reason, and it is quite time to describe a Criminal Appeal to the Home Office by its right name and to require it to be properly conducted and decided on grounds of reason and justice which the public can understand and appreciate.

APPELLANT.

### III.—THE LONDON STOCK EXCHANGE : A REVIEW AND SUMMARY.

THE recent issue of the third edition of Mr. Stutfields work on the rules and usages of the Stock Exchange<sup>1</sup> will naturally direct the attention of lawyers towards that remarkable institution. That the law of the Stock Exchange has only of recent years attained to a literature of its own is certainly not due to any lack of importance or difficulty in the subject.

When, in 1773, the London Stockbrokers formed themselves into an association, the dimensions and position

<sup>1</sup> *The Rules and Usages of the Stock Exchange.* By G. H. Stutfield and H. S. Cautley. London: Effingham Wilson, Royal Exchange, 1901.

which their association was destined to achieve can hardly have been anticipated even by the most sanguine of its founders. An accurate forecast would have required the divination of the future policy which was to permit the formation of companies with limited liability, a fore-knowledge of gold discoveries, and a prophetic appreciation of the manner and extent of the development of facilities for transport and communication. The membership has now nearly reached 5,000, a number which it is thought is amply sufficient to deal with any increase of business which is likely to take place within a considerable period. Under these circumstances it may be of interest to mention a scheme which has recently been formulated with the view of automatically limiting the membership. At present there is a somewhat inconvenient system of dual control. The Stock Exchange belongs to a company, and it is not every member who is a proprietor. On the other hand, all the proprietors are not members. The proprietors are represented by managers, and the members by a Committee. The interests of the two classes are not always identical. The heavy entrance fee which a member has to pay goes mainly in the payment of dividends to the proprietors, of whom he may not be one, and on his death nothing is left to represent the value of the money. Under the scheme a certain holding is to be made a condition of membership. The present proprietors are to be compensated by the issue of Debentures to an amount sufficient to yield the same interest as is now derived from the existing shares. The new share capital is to be £500,000 divided into shares of £100 each, and the holding of one share to be a necessary condition of membership; but no member may hold more than one share. By this means, and subject to any future increase of capital, the number of members would be limited to 5,000. In any case the dual control would be abolished, and the share

rendered a valuable asset in case of death. Full details of the scheme may be found in the *Financial Times* of February 27th, 1901, and its ultimate adoption seems very possible.

There are no other impending changes in the domestic constitution of the House to be recorded. The much discussed division between brokers and jobbers, which so distinguishes the English from the American system, is likely to survive. The arguments in its favour are the convenience of a ready and ascertainable market which it provides, and the protection afforded to the client by the skill and knowledge of the broker. A much greater variety of securities are dealt with in London than in New York, and the necessity for a separate class of dealers is therefore greater. The convenience is emphasized by the formation from time to time of new markets, so that a broker knows exactly where to go in order to effect a purchase or sale of shares dealt with in any particular market. In New York brokers act in the double capacity, a practice forbidden by Rule 43 of the London Exchange. London brokers must deal only with jobbers, and not with each other.

The main interest of members of the legal profession in the practice of the Stock Exchange of course relates to so much thereof as contributes to their own business. So far as disputes between members of the House are concerned, they have their own Committee as a first and final tribunal. The first and most essential preliminary to a study of the Rules is a correct appreciation of the triangular relations between jobber, broker, and client. Since the publication of the previous edition of Mr. Stutfield's book the details of this subject have been much more fully worked out, and some important decisions that have recently been given also require notice.

As between the client and the broker, the latter, being an agent, is bound by the same principles which govern the conduct of agents in general. The extent to which this doctrine will be carried is strikingly shown in the case of *Erskine, Oxenford and Company v. Sachs* (L.R. [1901] 2 K.B. 504), which came before the Court of Appeal on June 28th, 1901. The plaintiffs, who are stockbrokers, having become entitled to close their client's account, did so, and sued him for the balance due. The account was closed by a sale to jobbers of the shares which the plaintiffs had bought for the defendant. The plaintiffs, however, at the same time repurchased many of the shares from the jobbers, who in consideration of the prompt resale, made a closer price. A jobber, on being asked to quote a price, names two, one at which he will buy, and the other at which he will sell, the difference being his profit. In this case the jobbers gave a little more, and took a little less, than they otherwise would have done, and the result was that both brokers and client benefited. It was proved that the client got the fair market price for the shares, nevertheless the plaintiffs, while getting judgment for the amount of their claim, were held bound to account to their client for the profit they had made.

This illustration will serve to show the stringent way in which the law of agency will be applied to brokers. It is an open point whether they are liable to their clients as agents *del credere*, as warranting the solvency of the jobber. On the whole it is thought that the Courts would probably decide against the existence of this liability, but in practice it is frequently recognised by brokers when the jobber defaults.

On the other hand, the broker is entitled to indemnity from his client against all the liabilities which either the contract into which he has entered on the client's behalf, or the usages of the Stock Exchange, impose upon him.



Indemnity is different from mere repayment; the client is bound to put the broker in funds to meet any liability, and is not entitled to place upon the broker the obligation of paying in the first instance. It follows from this that a broker can close his client's account if the latter fails to indemnify him.

This summary proceeding must, however, be resorted to with great caution, as, if the facts do not justify it, the consequences may be serious. In *Michael v. Hart* (reported 17 T.L.R., 761) the defendants carried over certain shares for the plaintiff to the next Account, and wrongfully closed the various transactions before that day had arrived. They were held liable for the best prices reached by the shares between the date at which they were disposed of and the date of the Account to which they were carried over.

The relations existing between the jobber and the broker's client have of late been much discussed in the Courts. A usage of the Stock Exchange has here come into conflict with a rule of law, and the battle has been fought out between them with varying fortune. A judgment delivered by Mr. Justice Bigham since the issue of Mr. Stutfield's latest edition may be taken, subject to any appeal, to have finally decided the controversy in favour of the usage. The legal difficulty to be got over is that an agent employed to buy or sell does not establish privity of contract between his principal and the third party, unless he carries out his instructions to the letter. If, being instructed to buy a certain quantity of goods, he purchases more than that quantity, the principal incurs no liability, and can repudiate the contract. This is so, even though the additional quantity may have been bought for the account of some other person and the orders executed together for convenience. In other words, an agent for two or more persons cannot lump their orders together, and make one

contract to cover the whole. The rule is extremely technical, and has little to recommend it. According to the way in which bargains are made on the Stock Exchange, it is often impossible for a broker to make a separate purchase on behalf of each client. He is, therefore, obliged to include in his single contract with the jobber, made of course in his own name, all the orders for which he may have instructions at the moment. In times of speculative excitement prices vary in the space of a few minutes, and, moreover, it is difficult to get in touch with a jobber at all. Any other system of dealing would be impossible, or at least impracticable. When a broker defaults, the jobber is brought face to face with the broker's undisclosed principal, the client. In several cases of this kind the client, when sued by the jobber, successfully set up the defence that privity of contract had not been established between the plaintiff and himself, since the broker had given a larger order than that which he authorised him to give. It must be pointed out, however, that in none of these cases was the usage of the Stock Exchange so to do, judicially proved. This defect in the jobber's case was remedied in *Scott and Horton v. Godfrey* (L.R. [1901] 2 K.B. 720), the subject of the decision of Mr. Justice Bigham above referred to. The jury (a special jury) found for the existence of the custom. The learned Judge dealt with the question of privity of contract in this way: The defendant (the client) had given his order to be executed in such a way as the usage of the Stock Exchange authorized. Privity of contract is a question of intention. The broker when he gave the lump order intended that there should be privity of contract between the jobber and each client whose order was included. The plaintiffs (the jobbers) intended to make as many separate contracts as the brokers might have instructions for. Under these circumstances, a contractual relationship was established between jobber and client, and

each could sue the other in case of non-performance. This decision has been received with great satisfaction in the City, a fact which is of itself a considerable argument in its favour; and, moreover, accords with the views previously expressed by Mr. Stutfield on the matter. It also disposes of the question raised by him in the preface to the third edition of his work, namely, whether a jobber who has sold 1,000 shares to one broker can, on receiving a ticket for 500 only, refuse to deliver that amount unless and until he receives a ticket for the balance. Since he can sue for the purchase money, he must be under a corresponding liability to deliver. The fact that the Rules do not expressly provide that he must do so is now immaterial, and Mr. Stutfield's suggested amendment to Rule 101 therefore becomes unnecessary. The Courts indeed now show to the Rules and decisions of the Stock Exchange Committee a consideration which is in marked contrast with the somewhat cavalier treatment heretofore accorded them. *Meyer and others v. The Westralian Market Trust* (reported on July 30th) is a strong instance in point, because the Court, in accordance with a resolution of the Committee forced upon the defendants certain securities which they had never agreed to buy. The plaintiffs, who were brokers, had purchased for the defendants (subject to the Rules of the Stock Exchange), bonds of the Westralian Joint Stock Loan and Financial Corporation, Limited, for the special settlement. Before the special settlement was granted the latter company had gone into voluntary liquidation, and had transferred the whole of its assets to the Associated Financial Corporation. The bonds, therefore, could not be delivered, and the Committee passed a resolution to the effect that all bargains in the bonds were to be completed by delivery of debentures of the Associated Financial Corporation to an equivalent amount. It will be observed that the substituted securities, whether better

or worse than the bonds, were different from them. Moreover, the rate of interest was different. Nevertheless the defendants were held bound to take and pay for the new securities.

Two other cases decided since the publication of the third edition should be here mentioned. The legal position of the Stock Exchange assets of a defaulting member, and the mode in which they are collected and dealt with, are now well understood. But until the decision in *Stoneham and Messenger v. Wyman* (reported on June 13th) it was not clear whether a jobber by taking any benefit from the fund so created through a broker's default, thereby affected or reduced his rights against the broker's client. In this case the defendant on December 11th, 1899, carried over through his broker, 100 Lake Views to the end-December Account at 16½. On December 14th the broker was "hammered." Shortly after the end-December Account the jobber sold out the shares against the defendant at 11¼ and claimed from him the difference between the carrying-over and the selling-out price. So far the case is simple enough, but it transpired that the jobbers had claimed and received from the Stock Exchange assets of the broker the sum of £150, the difference between the carrying over and the hammer price. It was argued on behalf of the defendant that the plaintiffs were at all events unable to claim this sum from the defendant, since they had already received it. To this it was answered that the plaintiffs would have to repay the £150 to the Official Assignee if they recovered it from the defendant. The further point was then taken that the claim for and receipt of the £150 from the broker's assets amounted to an election by the jobbers to treat the broker as their debtor, and that they could not afterwards sue the defendant, because his liability was alternate and not several. The plaintiffs, however, succeeded on both points. The follow-

ing additional reason may be suggested for the opinion that the doctrine of election is not applicable to a case of this kind. The debt due to the jobbers from the defaulting broker, and from the client respectively, are not necessarily, or even usually, the same in amount. For instance, in the last-mentioned case the claim against the client was larger than that against the broker, since the price of the shares had gone down after the hammer price was fixed. On the other hand, in *Pain Brothers v. Macleay* (reported on July 4th), the broker owed more than the client, since the value of the shares at the special settlement, though less than the purchase price, was greater than that at which the defaulting broker's bargain was closed under the Rules. It may be mentioned that in the latter case the same defence, that an election had been made, was unsuccessfully set up. If the debts may differ in amount, how can they be the same debt? The analogy to the election cases, though captivating, seems to be quite misleading. In both these cases the jobber was suing the client. But in *Dealtry v. Mendelssohn* (reported 17 T.L.R., 759) the jobber sued the defaulting broker, who urged in defence that a portion of the money had already been recovered from his client, and also that there had been an "election." Both defences failed, and it is now clear that they will not avail either the broker or his client.

The recent disappearance must be recorded of the extraordinary notion that the client of a defaulting broker had the right, as against the jobber, to treat his contract for the purchase or sale of shares as closed at the hammer price—that is, the price fixed by the Official Assignee under Rule 177. This would give the client a threefold option, since he already has, under the rules, the right to carry out the transaction personally with the jobber, or to nominate another broker to do so on his behalf. It is impossible to conceive why he should have the

further right to accept the hammer price, and thereby gain an advantage through the default of his own agent. Moreover, the hammer price is fixed solely for the purpose of adjusting the claims of members of the House, *inter se*. Nevertheless, this supposed right was for a long time freely accorded, and sometimes fraudulently abused. It was only necessary for the client, on getting wind of his broker's default, to disappear until the next Account without leaving any address, and then reappear and accept either the hammer price or that obtaining at the Account, whichever gave him most advantage. The origin of this supposed right is somewhat obscure, but it certainly received some support from the language of the Court of Appeal in *Hartas v. Ribbons* (22 Q.B.D. 254), and was recognized by Mr. Justice Kennedy in *Beckhuson v. Hamblet* ([1900], 2 Q.B. 18), and by Mr. Justice Mathew in *Anderson v. Beard* (*ibid.*, p. 260). In the first of these cases the defaulting broker told his client that he had this particular right, and the client thereupon agreed to treat the contract as closed at the hammer price. Under these circumstances, he was held liable to indemnify the broker, on the ground that he had "elected to treat what had been done," that is the closing of the account under Rule 177, "as done on his behalf, and to ratify his agent's action, instead of keeping the account open and carrying out the contract on the account day." After the exposition of the meaning of the word "ratification" in *Keighley, Maxted & Company v. Durant* (L.R. [1901], A.C. 240), it is apparent that the client could not "ratify" the closing. The Official Assignee, by whom the closing was done, was not, and did not profess to be, acting as the agent of the client. And *Levitt v. Hamblet* (16 T.L.R. 436), finally negatives the existence of the supposed option.

It appears from *Currie v. Booth Bros.* (6 Com. Cas. 74) that where a broker sells shares for a client to a jobber, and defaults, the jobber cannot insist on a personal com-

pletion with the client, *i.e.*, that the client shall himself tender the shares. This is important, because in the case of a speculative sale the client may not have the shares and be unable to find the money to get them in order to make delivery. The client is entitled to nominate another jobber to transfer the shares to the buying jobber, or to the name given by him.

• So far the questions which have been discussed are comparatively simple. The complications which may arise under the very important Ticket rule (R. 94) are of much greater difficulty. Hitherto a bargain has not been traced further than the first jobber concerned, and then only from one end of the chain which connects the seller with the purchaser. There may be an unlimited number of intermediaries. The relations *inter se* of such of the intermediaries as are members of the House are the concern of the Committee of the Stock Exchange, who decide any disputes that may arise. But at each end of the chain there is usually a member of the public, so that in such case disputes between the first seller and last purchaser, or between one of them and some intermediary, necessarily come within the cognizance of the Courts.

The analysis and treatment by Mr. Stutfield of the various positions involved leaves nothing to be desired.

Under the Ticket rule the buyer who takes up securities deliverable by deed of transfer must before a stated time during the Account issue a ticket containing the amount and description of the stock, the name, address, and description of the transferee in full; the price, the date, and the name of the Member to whom the ticket is issued. Each intermediate seller, in succession, to whom such ticket is passed, must endorse thereon the name of his seller. To understand this rule, it must be remembered that the intermediary jobber or jobbers, keep, in the main, a level book. That is, as soon as they buy, they sell to

someone else, and *vice versa*. They do not, as a rule, intend to deliver or take delivery of the shares. The Ticket system is necessary in order that the "ultimate seller" may be brought promptly into contact with the "ultimate buyer." These two situations are respectively filled, for Stock Exchange purposes, by the member who first sold, and the member who last bought the shares. The former is also described as the holder of the ticket, the latter as the issuer of the ticket. Let us suppose that each of them is acting for a client. When are their respective clients brought into legal relationship? According to the authorities this event occurs upon delivery of the necessary documents by the broker of the selling client, and payment of the purchase money by the broker of the buying client. From this point the selling client becomes trustee of the shares for the buying client, and entitled to an indemnity from him, even if the latter has caused some nominee of his to be named on the ticket as transferee. There might be some difficulty in suing anyone but the actual transferee at common law, but the equitable principle just referred to establishes the liability of the real purchaser, although he may not be the nominal transferee. And the right to an indemnity is obviously of great importance if the shares sold are not fully paid up; or if the company is wound up before the transferee has become the registered owner, and calls are made on the shares. It is also important to observe the position which the intermediary jobber occupies with respect to calls upon shares which he has purchased and resold during an Account. By the usage of the Stock Exchange (assented to by the Courts) the jobber, not wishing to take up the shares himself, is at liberty to substitute the name of another willing to take his place as transferee, which name is signified by passing the ticket under the above rule; and thereby releases himself from liability. The seller has ten days in



which ~~to~~ complete, and within that time may take objection to the name passed, upon the ground that the substituted transferee is not a solvent person. Even after completion, he may object if the substitute is an infant, or otherwise unable to contract. Passing an informal ticket, or a name to which a good objection is taken, leaves the jobber still liable. It is probable, though not certain, that, with regard to his immediate seller, the broker of the buying client can get rid of his liability in the same manner. He does not, of course, incur the liability of a purchaser to anyone else. In view of the uncertainty that exists as to whether brokers and jobbers are in the same position, so far as the way in which their liability as purchasers may be displaced is concerned, it seems desirable that brokers should be placed on the same footing as jobbers by an express rule. A jobber is also discharged from all liability as purchaser under Rule 103, if the deliverer does not deliver within thirteen days of the settling day, and under Rule 106 from all liability as seller if the issuer of the ticket does not receive delivery within ten days, and neglects to "buy in" within thirteen days.

Space will not permit of a more extended review of the relations between the various parties to a Stock Exchange transaction, and it is thought that the main features of their relative positions have been sufficiently outlined. Among the other points which remain to be mentioned prominence must be given to the common, and, from the point of view of the client, advantageous practice for brokers instructed to carry over to the next Account, to "take in" the stocks themselves and carry them over as principals instead of doing so in the market. The advantage to the client is that he pays a slightly smaller rate of contango. Moreover, the broker when carrying over in this way as a principal, cannot charge his client any

commission for so doing. Nevertheless, this custom for a broker to convert himself from an agent into a principal is invalid, and the client, unless he has assented to the particular transaction, can refuse to pay either the differences or contangoes charged to him.

A summary of current Stock Exchange questions would hardly be complete without some reference to the much-discussed subject of market-making. This operation is becoming more and more to be considered as a necessary incident of promotion, even where sound companies are concerned. Since the expense of carrying it out falls in the first instance upon the promoters, it follows that they will have fixed the price at which the particular company is to acquire its property at an amount increased by the estimated outlay involved in "making the market," in order to ultimately recoup themselves therefor. As a matter of fact the operation results in a tax upon the prospective shareholders for the benefit of brokers and jobbers, and the over-capitalisation of the company at least to the extent of the tax.

A market may be made either before or after allotment, but in either case the process is the same. Some person (or persons) interested in getting the shares subscribed for, or in disposing of them, as the case may be, instructs a broker to bid for a number of the shares at a premium. The broker carries out his instructions, pockets his commission, and does not embarrass himself by unnecessary inquiries. A jobber willing to sell them at a premium will easily be found, provided that options over shares in the Company are given to him at a price which will show him a profit, and ensure him the power to deliver as many as he may require to complete his sales. The broker's commission and the jobber's profit constitute the expense of making a market, and those who pull the strings have, of course, to defray it in the first instance. In due course

the bargain appears in the papers, and the uninitiated public naturally suppose that the shares are at a premium. By this means the public are induced to apply for an allotment, or, if the market is made after allotment, to purchase the shares, and the operators are amply repaid for their outlay.

The initial purchase at a premium is a real transaction, but it is certainly not a *bonâ fide* one. In principle it is somewhat analogous to a sham bid at an auction. It is a representation by conduct that there is a genuine market in the shares at that price, intended to be communicated to the public through the medium of the Press, and to induce members thereof to act upon it by applying for shares. As the representation is false, nothing is apparently wanting to ground an action for damages in the event of pecuniary loss ensuing, save the discovery of the person responsible, and the establishment of his responsibility. This is a practical difficulty which it is usually impossible to surmount. In *Scott v. Brown* (L.R. [1892], 2 Q. B. 724), it was decided that a combination to make a market in this way and for these purposes, was an indictable conspiracy. The operation therefore must usually involve a positive fraud, and frequently a criminal offence. It is true that it is sometimes resorted to in the justified belief that the shares are worth the money, and will soon go to a higher premium. In this view the method seems a prompt and natural way of starting dealings in the shares. But it is difficult to see how it can ever be regarded as wholly innocent; and very often a gross fraud is intended from the very first.

It is doubtful whether any practical remedy can be suggested. In 1865 a rule was passed prohibiting dealings in shares before allotment, but this rule proved unenforceable, and has ceased to exist. Perhaps, as many think, the only real safeguard against these and the

kindred evils of our company system lies in the intelligence of an educated public. How far the requisite standard of acuteness is likely to be evolved is a question which only the future can solve.

T. E. HAYDON.

#### IV.—CLAIMS AGAINST ESTATES OF DECEASED PERSONS.

IT was not until comparatively recently that any person interested in an issue could be a witness on the trial of it; and the Law of Evidence Amendment Act, 1851, first enabled the parties to a proceeding to give evidence in the proceeding. The temptation to give false evidence is naturally much greater if there is nobody in existence who can positively contradict it. This must nearly always be the case when a claim is made against the estate of a deceased person founded upon an alleged contract with him. Hence Courts of Equity established an inflexible rule that no such claim could be admitted upon the uncorroborated evidence of the claimant. This rule of practice no doubt came into existence as soon as the parties to a proceeding were made competent witnesses; for in 1855 effect was given to it in *In re Farrow* (22 Beav. 400), and in 1865 we find Lord Romilly, M.R., referring to it as a rule constantly acted on in Chambers in Equity. In *Grant v. Grant* (34 Beav. 623), a case in which a widow was claiming certain articles, which she alleged had been given to her by her husband, he said:—"In the first place, there is a rule constantly acted on in Chambers in Equity, that the unsupported testimony of any person, on his own behalf, cannot be safely acted on. If it were otherwise, any stranger might come and swear that any testator owed him a sum of money; but that is not sufficient proof: the question would be asked,—Is there any writing or other proof of the debt? Without that, this Court does not

listen to the declaration of the claimant, and is obliged in all cases to disregard it; and though, in many cases, it may prevent a person from receiving what he is justly entitled to, still the Court cannot act on the mere unsupported testimony of a claimant." This principle was re-stated by the same Judge in *Down v. Ellis* (1865) (35 Beav. 578), by James, L.J., in *Rogers v. Powell* (1869) (38 L.J. N.S. Ch. 648), *Morley v. Finney* (1870) (18 W.R. 490), and *Hill v. Wilson* (1873) (L.R. 8 Ch. 888), by Bacon, V.C., in *Whittaker v. Whittaker* (1882) (L.R. 21 C.D. 657), by Jessel, M.R., and Baggallay, L.J., in *In re Finch* (1882) (L.R. 23 C.D. 267), and by the Vice-Chancellor of Ireland in *In re Harnett* (1886) (17 L.R. Ir. 543). As James, L.J., more than once remarked, mankind would not be safe if the Court were to act on uncorroborated evidence of transactions with a deceased person. And it is worthy of note that the Legislature, in passing the Law of Evidence Amendment Act, 1851, thought it necessary to preserve, by section 5, the provision of the Wills Act, rendering void any gift by will to an attesting witness of the will or to the wife or husband of such attesting witness. The current of judicial decisions to which I have referred was undisturbed until the year 1885, when dissent was expressed by Brett, M.R., in *In re Garnett* (L.R. 31 C.D. 1) and by Sir James Hannen in *In re Hodgson* (L.R. 31 C.D. 177). In the former, in which none of the cases above mentioned seem to have been referred to, Brett, M.R., says:—"Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the Judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the Judge in fact believes to be absolutely true, is, according to a doctrine of the Courts of Equity, not to be believed by the Judge, because he is not corroborated? The proposition seems unreason-

able the moment it is stated. There is no such law. The law is that where an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in Law or Equity." And in *In re Hodgson*, Sir James Hannen says:—"Now, it is said on behalf of the defendants, that this evidence is not to be accepted by the Court, because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons, there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence, through death, of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon." In this state of the authorities the case of *Rawlinson v. Scholes* (15 T.L.R. 8.) came before a Divisional Court, in the year 1898, on appeal from the County Court at Blackburn. It was a claim made by a husband against his deceased wife's executors to recover the sum of £150, which he alleged he had lent to her in order that she might lend it to her sister. The husband

swore that the money was not a gift to his wife, but merely a loan. Other evidence was produced to show that the wife's sister had applied to the wife for a loan of £150, and that the wife had said she would have to get it from the plaintiff; that the wife applied to the plaintiff, who drew £150 out of his bank, and in the presence of the wife's sister, handed the money to the wife, who then handed it to her sister. The sister had repaid it to the wife's son during the wife's life time, and the son had given a receipt for it in the wife's name. This son was now executor of his mother. Upon these facts the County Court Judge held that there was no corroboration of the plaintiff's evidence as to the transaction being a loan by him, and that he was therefore bound, in accordance with the decision in *In re Finch (supra)*, to disallow the claim. On appeal from this ruling the Divisional Court held that *In re Finch (supra)* was inconsistent with *In re Hodgson (supra)*, and that the law was properly stated by Sir James Hannen in the passage quoted above from his judgment. Let us examine what the conflict is between *In re Finch* and *In re Hodgson*. Sir James Hannen says, if the uncorroborated evidence of the claimant brings conviction to the tribunal which has to try the question, there is no rule of law which prevents that conviction being acted upon. No Equity judge has ever said that there was such a rule of law; and in *In re Finch*, Sir George Jessel expressly says it is not a rule of law. "It is a rule of prudence," he says, "that, sitting as a jury, we do not give credence to the unsupported testimony of the claimant, with a view, no doubt, of preventing perjury, and with a view of protecting a dead man's estate from unfounded claims. It is not a rule of law, but it is a question to be decided by a jury, although the judge must recommend the jury not to trust the uncorroborated evidence; but still, if they did, I do not know that any-

one could interfere with their verdict. But where we are sitting here as a jury we apply that rule to ourselves." Sir James Hannen says it is natural that in considering the statement of the survivor we should look for corroboration in support of it, whilst Sir George Jessel says that the jury, if there is one, should be recommended not to trust the uncorroborated evidence, and if there is no jury, that the judge should apply the same rule to himself. Both Lord Esher and Sir James Hannen admit that a claim against a dead man is, as regards the consideration of the evidence, to be treated differently from one against a person who is able to come forward and meet it. It is to be treated with suspicion, and the evidence carefully scrutinised. Where is this rule of law—for Lord Esher says it is the law—to be found? It must have come into existence since 1851, for before that date there could be no opportunity of applying any such rule, since the claimant's evidence would not have been admissible. Lord Esher's own dictum in *In re Garnett* (*supra*) is its first appearance in the books: and why is it to be preferred to, or to over-rule a practice which had then been in existence and universally acted on in Chancery for over twenty years, sanctioned, as it was, and emphatically commended by such judges as Lord Romilly, Sir Wm. James, and others? To adopt the words of Lord Blackburn in *Maddison v. Alderson* (L.R. 8 App. Cas. at p. 487). "It is not merely that the sole witness is a person deeply interested, giving testimony as to what took place between herself and a person deceased, and that no judge sitting in Equity and deciding both the law and fact would have acted on such evidence without confirmation." "I do not think," he adds, "there is any rule of law which prevents such unconfirmed evidence from being admissible, or that would prevent a jury from believing and acting on such evidence, though it ought to be strongly



pointed out to them how dangerous it would be to do so." Now if it ought to be a direction to the jury that it is dangerous to act upon the uncorroborated evidence of a claimant against a dead man—just as in the Criminal law a judge is bound to tell the jury that they ought not to act upon the uncorroborated evidence of accomplices—surely it is only reasonable and logical that a judge sitting without a jury should act in the same way that he is bound to advise a jury to act. Hence the rule which was firmly established in Courts of Equity where juries rarely appear. That which Lord Esher and Sir James Hannen lay down as a rule specially applicable to such cases, namely, that the evidence is to be approached with suspicion, but if convincing is to be acted upon, not only has the demerit of uncertainty, because what may be convincing to one judge or to one jury may not be so to another, but it is in fact to apply no different rule to such cases than that which is applicable to any action in which the burden of proof is on the plaintiff. In every case the judge or jury must be satisfied of the truth of the evidence by which it is sought to discharge this burden, and in most cases a certain degree of suspicion, be it more or less, has to be dispelled from the mind of the tribunal before it is satisfied. Lord Esher and Sir James Hannen being Common law lawyers were perhaps disinclined to adopt a practice which had sprung up in Equity; but if there were a variance between what, before the Judicature Act, a Court of Law, and a Court of Equity would have done, the rule of the Court of Equity must now prevail. [See per Lord Cairns in *Pugh v. Heath* (L.R. 7 App. Cas. 237)]. Such a rule if universally applied would shut the door to fraud where the opportunity for fraud is greatest. To put forward a claim against a dead man is nearly always easy; to put it forward with every semblance of truth and probability needs only that degree of skill which

most rogues possess. It is surely far better that an honest claim should now and again be defeated than that such an opportunity and temptation should be presented to the unscrupulous. Most, if not all, restrictive legislation and rules must work some injustice. Thus the Statute of Frauds and the Statute of Limitations often shut a man out from prosecuting a claim, the justice of which no one could doubt; yet the need for protection is not nearly so great in most of the cases which are affected by these statutes as in the case of a claim against a man who is no longer there to answer it; and Lord Esher's appeal to reason in reference to the latter is a condemnation of those Acts which have been directed against fraudulent and stale demands, Acts which have withstood the criticism of ages. In a case which recently came under the notice of the writer, a claim was put forward by a man against the estate of his deceased brother for a large sum of money alleged to have been lent by the claimant to the deceased upwards of thirty years previously. Not a scrap of writing was forthcoming to confirm the plaintiff's evidence, which was to the effect that the money was lent to enable the deceased to buy out the share of a third brother in a certain farm. This third brother was called for the plaintiff, and he deposed that he saw the money handed by the plaintiff to the deceased in bank notes, that these bank notes were then and there transferred to him as the price of his share in the farm, and that they represented the amount now sued for. On production by the deceased brother's widow of the conveyance of this share it appeared that the price paid for it was a very different amount to that stated by the brothers; yet, in the face of this contradiction of the plaintiff's story, the judge allowed his claim. This decision may have done justice, or it may have worked a grievous wrong by depriving the widow of everything she possessed; but it illustrates the danger of giving judges a free hand.

On the whole, it is submitted, that it would be far better that the rigid rule so long established in Courts of Equity should prevail.

G. D. KEOGH.

## V.—PRISON ADMINISTRATION AND REFORM.

**A** REPORT of the proceedings of the fifth and sixth International Penitentiary Congresses, held at Paris and Brussels, drawn up by Mr. Ruggles-Brise, Chairman of the Prison Commission for England and Wales, which was recently presented to both Houses of Parliament by the Home Secretary, contains much valuable and interesting matter for those who are concerned in Prison Administration and Reform and perhaps calls for more than a passing reference.

Mr. Brise was the delegate of the British Government at these two congresses. In the Blue Book<sup>1</sup> before us he has summarised the work of the delegates and appended the contributions made to the proceedings by English officials.

The object of these international congresses is to discuss points of Criminal law and prison administration and to get not merely at national, but at international opinion on such matters. The value of an international penitentiary congress is not to be estimated by its immediate positive results. These gatherings may not (and perhaps it is well that they should not) produce any immediate effect on positive law or prison management. Their real value consists in keeping the minds of statesmen and administrators alive to the vast problems connected with the treatment and diminution of crime. The minds of administrators in particular are apt to settle down into traditional grooves and to regard the methods they have been accustomed to

<sup>1</sup>*Two Prison Congresses*: Paris, 1895; Brussels, 1900. Presented to both Houses of Parliament. London, 1901.

in the past as the only possible and practical methods. This is especially the case in so far as regards prison administration. The internal management of a prison is very seldom before the public eye. A prison is a place of which the general public know extremely little. More perhaps than any other department of the State it is in the hands of officials. The result is administrative conceit and its inevitable accompaniment, administrative stagnation. It is no exaggeration to say that this was the state of English prison administration a few years ago. This fact impressed itself on the Home Secretary of the day and he decided that it should, as far as possible, be remedied by making Great Britain a member of the permanent international Penitentiary Commission.

Events have proved that the Home Secretary took a step in the right direction. The papers contributed to the congresses by the British delegates which are reproduced in this Blue Book are a vast improvement on the Prison Commissioners Reports of a few years back. In fact these papers are the most interesting part of the present Blue Book. Most of them are by Mr. Brise and they cover a variety of topics. Some of the subjects he deals with are State Reformatories, Indeterminate Sentences, Professional Criminals, Discharged Prisoners Aid Societies and the English Prison System at the end of the Nineteenth Century. His paper on State Reformatories is for the most part a comparison between English and American Reformatory School Methods. The essential difference between the two countries in this respect is that in England offenders cannot be committed to a Reformatory school over the age of sixteen while in America offenders can be committed in some States up to the age of thirty. In America the Reformatory is more properly speaking a Reformatory Prison than a Reformatory School. Mr. Brise is inclined to support

the opinion that reformatory treatment might be safely extended to juveniles who have passed the age of sixteen. He thinks that reformatory treatment might be applied to the proper class of cases till the age of maturity has been reached, that is till twenty-one. It is from the ranks of juveniles between the ages of sixteen and twenty-one that the great mass of habitual criminals is drawn. If proper steps are taken to prevent young offenders from becoming habitual criminals, a great deal will have been done to arrest the growth of the most dangerous kind of crime.

Dr. Baker, the assistant Medical Officer at Pentonville Prison, contributes a valuable paper to the Brussels Congress, on the relation between Alcoholism and Crime. He draws his information from the Criminal Statistics of England and Wales, from the Report of the Royal Commission of 1899 on the Licensing Laws, and from his own experience as a Medical Officer at Pentonville Prison. Considerations of space forbid us to go through his arguments in detail. Many of his points are incontrovertible, and every one will agree with him that drink is a weighty factor in the production of crime. He is inclined to believe that sixty per cent. of the total offences committed in this country are directly due to alcohol. In making this estimate he omits one important point. His figures refer to the population of prisons only, and not to the convicted population as a whole. If the total convicted population is taken into account, he will see that his estimate is too high. In so far as his calculations hold good, they only hold good with reference to the prison population. In dealing with the connection between drink and crime, many students of this sad problem are too apt to look upon drink as an ultimate factor, and to say, do away with drink and you will at the same time do away with crime. This is a somewhat superficial view. Drink, in too many cases, is itself an effect. It may be, and often is, the cause of

pauperism, as Dr. Baker asserts, but it is just as frequently the effect of pauperism. Dr. Baker furnishes us with some remarkable statistics regarding the high percentage of decadent and degenerate youths committed to Pentonville Prison. These young people, he points out, are far below the average of the general youthful population in physical capacity. As a class they are stunted and emaciated both in body and mind. In them the drinking habit finds an easy prey. But it would be a mistake to say of them when they come to prison that the ultimate cause of their downfall is drink. In their case drink and crime are the common result of the wretched hereditary and social circumstances in which they were born and bred. Pauperism, crime, alcoholism, insanity and suicide, have all their ultimate origin in these wretched circumstances. The radical cure for criminals of the drunken type is not to be found in Inebriate Reformatories, valuable as these institutions, when properly organised, may be. Crime is too deeply seated in the social organism to be cured by such methods alone. Crime has its roots in the deplorable hereditary and social circumstances of vast masses of the population, and until these conditions are ameliorated by wise social legislation, and the concurrent development of higher ethical standards, we shall not witness a real decrease in the number of offenders. These remarks arise out of the perusal of Dr. Baker's excellent and instructive paper. It is a paper which must have cost him a great deal of time and labour. We trust that he will continue his study of the criminal classes and present us from time to time with the result of his investigations.

How are we to deal with the prisoner when his sentence has expired and he is once more a free man? This is a question which Mr. Brise attempts to answer in his paper contributed to the Paris Congress on Discharged Prisoners' Aid Societies. Many of the principles which he lays down

are sound and judicious, and his appreciation of the work done by such societies in England is well deserved. Nevertheless, as much is not done for the discharged prisoner as might be done. The Commissioners of Prisons should offer greater facilities than they now do to voluntary and unofficial agencies. Any person or body of persons who want to help a prisoner on the expiration of his sentence should be permitted and encouraged to do so. It is sometimes said that there is a competition for cases; that too many people take up the task of assisting discharged prisoners. This is ridiculous and childish. Nearly 170,000 convicted prisoners are annually committed to prison in England and Wales. Among this vast mass of fallen humanity there is ample room for the beneficent operation of all sorts of agencies. Until a more liberal policy is adopted towards voluntary prison workers who wish to help prisoners after discharge we shall continue to have a deplorable amount of re-convictions. At the present time there is perhaps more absurd red tape surrounding the working method of assisting discharged prisoners than in all other departments of the service put together.

It is very remarkable that the only complete account of the English prison system is the work of a German, Dr. Aschrott. This work was written some years ago, and is now hardly up to date. Mr. Brise's paper on English prisons at the end of the Nineteenth Century, contributed to the Brussels Congress, requires to be read in connection with Dr. Aschrott's book. It is a concise statement of the present legal methods of dealing with prisoners in local prisons and convict establishments.

W. D. MORRISON.

## VI.—OBITUARY : LORD MORRIS AND KILLANIN.

**T**HE family of Morris is one of the fourteen " Tribes of Galway." This expression was first used by Cromwell's soldiers in 1652 in reproach for the singular attachment shown to each other by these ancient families in their determined resistance to the long and obstinate siege of the town, and during their subsequent oppression ; but the term was afterwards adopted as an honourable distinction in what has since been known as " the Citie of the Tribes." Their names are thus given by Hardiman in his History of Galway (1820) :—Athy, Blake, Bodkin Deane, Darcy, Kirwan, Lynch, Ffont, Joyce, Martin, Browne, Morris, Skerrett, French.

From the year 1486, when Richard Morris was Bailiff of Galway, the family were prominent in the affairs of the town, many members of it being Mayors and Bailiffs. In 1652 Andrew Morris took an active part under General Preston in the defence of Galway, and upon the surrender of the town was one of the citizens who refused to sign the articles of capitulation. But from that time the " Tribes " who remained loyal to the old faith were no longer eligible for any public position in their native city, and those of them who survived the persecution of the eighteenth century continued to live quietly in the town or its outskirts. The Morrises resided at Spiddal, which they had acquired by marriage, and in Galway. The clanship of the " Tribe " families, however, was always maintained and they frequently intermarried—in which connection it is interesting to note that Lord Morris' great-grandmother was a Browne, his grandmother a Lynch, and his mother a Blake.

Martin Morris, the father of Lord Morris, was born in 1784. With the relaxation of the penal laws the family again came to the front, and Martin Morris was a magistrate and the first Catholic since the Battle of the Boyne to



hold the office of High Sheriff of the town, which he did in 1841; while his son was yet to be the first Catholic to fill the great position of Lord Chief Justice of Ireland since the same date.

Michael Morris was born in Galway in November, 1826. His boyhood was spent there and at Spiddal, during which time he imbibed that strong love of his native place which through a long and varied career he never lost. The tragic death of his mother from cholera in 1833 led to his becoming his father's constant companion in these early years, always accompanying him on visits and trips in Ireland. Of a journey to Dublin in 1837, the year of the late Queen's coronation, he used to relate how it took 28 hours in the canal-boat, and how in the lottery for resting-places he was fortunate enough to draw the prize of a plank-bed on the table. It was through this early intimacy with older people, coupled with his retentive memory, that he acquired a great deal of that knowledge of people and events of his boyhood and of even long before his own time that was so remarkable in him. He was educated at the Erasmus Smith School in Galway, and from it got an exhibition in Trinity College, Dublin, which he entered in 1842. His career in Trinity College, where he "lived in" in the well-known Botany Bay Square, was a distinguished one. But, of course, he was precluded from trying for a scholarship on account of his religion. His college friends and contemporaries, few of whom now remain, included the present Chief Baron Palles, the late Mr. Justice Murphy, the late Mr. Justice Harrison, and Mr. Williamson, the present Senior Fellow of T.C.D. He is remembered as conspicuous even then for his conversational vivacity and wit. He was a good athlete, too, a fact that did not militate against his progress. He could play racquets with any man in Ireland, and his skill at the fine old game was an

accomplishment of which he was proud. Even when advanced in life he still played well, and he was probably the only Irish Judge who had ever contested in an alley with an Irish Viceroy, which he did with Lord Eglinton in Galway. He was diplomatically beaten on the occasion, but it was one of the few defeats, as he said himself, that had ever overtaken him in a "court." In 1846 he graduated as First Senior Moderator in Ethics and Logics. His answering at the examination was exceptionally brilliant; at the conclusion of the second day he stood decisively highest; three or four of the men who came next (amongst whom were the late Sir Francis Reilly Counsel to the Speaker, and the late Professor Cliffe Leslie), were almost equal; and from the third day's examination which took place to determine their order, he was exempted. For this unusually brilliant answering he was awarded the Large Gold Medal.

Being too young, however, to go to the Bar, he spent the next year in travelling, and among other places visited Rome. It will be remembered that during these years Ireland was suffering from the great famine, and Lord Morris had poignant recollections of that terrible time. In Trinity Term 1849 he was called to the Irish Bar and joined the Connaught circuit. At the Bar he enjoyed a considerable practice from the first in the Common Law courts. There, and especially in jury cases, he proved an extremely clever, sturdy, and successful advocate. His remarkable sagacity combined with a keen sense of humour, the effect of which was emphasised by his unaffected rich Galwegian brogue, brought him many friends and clients. As a sound jurist, with a wide knowledge of human nature, a ready wit, a shrewd common-sense, and an unfailing directness and clear-sightedness, he soon came into prominence and popularity, and after a few years, in 1857, the Government of the day made him Recorder of Galway, a post which

he filled until he entered Parliament in 1865, succeeding in the representation of the Borough of Galway his great friend Lord Dunkellin. When he had taken silk (in February 1863) and was in leading business at the Bar, the interruptions in his work, necessitated by going to Galway to hold his Sessions while the Courts in Dublin were in full swing, lost him briefs and gave him a strong motive for hurrying back to the Metropolis. On one occasion, it is said, he was hearing the last case on his list, which was a dispute with reference to a few shillings. The case, however, was argued at great length and with extraordinary heat by the opposing solicitors. Within a few minutes the Dublin train was timed to start. The Recorder looked at his watch, but the wrangle did not seem to be approaching a conclusion. At last he said, "See here, gentlemen, I must catch the train. Here is the sum in dispute," throwing down the silver as he vanished from the court.

Lord Morris's parliamentary career, which lasted until 1867, was brief but eventful to him, and in the course of it he had to undergo three elections. His return at the General Election in 1865 was the first public evidence of that extraordinary popularity which he, and his family since, have enjoyed in Galway. On that occasion he said he would resign unless he polled ninety per cent. of the electors ; he issued no address ; and stood on "Independent principles." On his appointments as Solicitor-General and as Attorney-General in 1866, he was returned unopposed, and on his giving up the seat, when he went on the Bench in 1867, he was succeeded by his brother, the present Sir George Morris, K.C.B., who for many years represented the town ; while only last year, despite the united opposition of the Irish Nationalists and of the Roman Catholic clergy of the town, Lord Morris's eldest son, the present Lord Killanin, accomplished

the marvellous feat of wresting back the seat to the family, and so became the only Conservative member of Parliament in Ireland (except Trinity College) outside Ulster. Lord Morris, having just previously retired from his judicial position, was politically unmuzzled, and he availed himself of this freedom to take a part in the election of his son. Speaking at the Claddagh, from within a stone's-throw of the house in which he was born, he was able to bandy colloquialisms in the Irish language with the fishermen, and he recalled many old memories that went straight to their hearts. The mutual bond of affection and loyalty which has so long and through so many vicissitudes subsisted between the family of Morris and the "Citie of the Tribes" is one of the romantic stories of Irish political life.

In 1867, at the comparatively early age of forty, Lord Morris commenced his long and eminent career on the Bench. As a judge he was characterised by moderation, clearness, and the vigour and soundness of his views. He had a thorough knowledge of the principles and practice of the law, the highest moral courage, unswerving rectitude, and great common sense,—which are not the least valuable qualifications in the administration of justice. He devoted himself to his duties with extreme assiduity; and for rapidity and breadth of judgment, astuteness and penetration, fairness and firmness, he could not well be surpassed. He had before his elevation gained a name as a cross-examiner, and the gift which he undoubtedly possessed of worming out the important facts of a complicated case he turned to the greatest advantage as a judge. A jury felt always safe in his hands. The common-sense view always prevailed with him and he was able to measure the probabilities of a case or the credibility of a witness better than most lawyers of his time.

It is true he was not a profound lawyer, but he had an

unerring grasp of human nature and of the facts of life, founded on a firm basis of sterling common-sense and an undisguised contempt for anything bordering, in his opinion, on humbug or pedantry. When Lord Morris presided in the Common Pleas the following advice was not infrequently given to would-be litigants. "If you have the merits of the case but not the law, go to the Common Pleas. If you have the law on your side but not the merits, go to the Exchequer. If you have neither the law nor the merits, go to the Queen's Bench." The Chief Justice was fully aware of this opinion being current, as was proved by the following incident:—In an action brought before him counsel had raised a defence highly technical, but unanswerable in point of law, to a motion for judgment to recover the price of goods sold and delivered. "Ah," said his lordship, "that's a good law point—a good Exchequer point, do you observe? But why doesn't your client pay the man for his goods?" "Because he never got them," replied the advocate. "Now that's a good Common Pleas point—if you can prove it," the judge rejoined. But the real reason why he had such a reputation is probably to be found in a certain ostentatious contempt for law and lawyers, which he was fond of expressing at times. Counsel in a sanitary case once said, "I shall assume that your lordship is fully acquainted with the statutes and authorities." "Assume nothing of the sort," was the unexpected reply, "I yield to no man in my utter ignorance of the sanitary law." And yet if an inexperienced junior were to trust to such a disclaimer, he would probably soon find what a mistake he had made. If the opinion of some venerable jurist was quoted, he would ask, "Who's that?" The Law Reports he regarded as *prima facie* a series of attacks on the Common Law and on common sense. He disregarded them when he could, and,

when he had to yield, he did so with a manifest scorn for the judges whose judgments are recorded, for the reporters who perpetuated them, and for the industrious advocate who had unearthed and quoted them. But so sacred is precedent in English jurisprudence that no judge can so act without serious jeopardy to his reputation as a lawyer. One critic well said of him, "Although I believe I am right in saying that seldom, if ever, has a judicial sentence of his been reversed, still he seems to me to have a mind moulded in such a way as to preclude him from ever becoming as distinguished a judge as another who has not half his capacity. 'Some people,' Swift says, 'will never learn anything, for this reason—because they understand everything too soon.' I am very far from saying he will never learn anything—his whole life has been one ceaseless round of learning—but I do say that he understands too quickly to ever hope to be able to pay that attention to details and trivialities which is essential for a judge who desires to have his name handed down to posterity in the index or contents-table of a Law Report."

Yet there is no doubt he was a strong, good, and, withal, a popular judge. He was a judge all through the troubled times of the last century, from the Fenian outbreak in 1867 to the collapse of the Parnell movement in 1889. "At a time when the Land League agitation had ranged three fourths of the people of Ireland in hostility to the Courts of Justice, his great common-sense and bluff humour were as good a stand-by as the Coercion Acts." His juries gave right verdicts when no others would. In face of a searching and good-tempered wit such as his, it was not possible for men to perpetrate sullen injustice, and the unruffled equanimity that enabled him to manage them when most good men were hot with righteous indignation, argued great qualities. It was based

on a warm heart as well as on a mind of quite exceptional balance and acuteness. Mind and heart together gave him a perfect understanding of his countrymen, and had there been half-a-dozen such judges in Ireland the lawless organisations of those days might have died of conscious extravagance. "There you go on with your marching and counter-marching," he said, in his rich brogue, to some farmers' sons charged with illegal drilling, "making fools of yourselves, when God and Nature intended you to be out in the fields picking potatoes";—and after that a mild sentence was quite enough. On another occasion, in reply to the argument of an eloquent advocate that "the People" were in sympathy with certain offenders, he said, quite in the style of Doctor Johnson, "I never knew a small town in Ireland that had not a blackguard in it who called himself 'the People!'" Yet the most virulent Nationalist has never been able to call his impartiality in question. The truth is his countrymen understood him, and therefore liked him even when brought into unpleasant relations with him. He was, at any rate Irish—as Irish as themselves. Had he not defined *primâ facie* evidence to a common jury in a way they thoroughly appreciated? "If you saw a man," he said, "coming out of a public-house, wiping his mouth, that would be *primâ facie* evidence that he had been having a drink." He was indeed a sublimated edition of his countrymen; and was just the sort of man, as was said of him at the time, who, had Ireland never been attached to England but were still subject to the enlightened code of the Brehon Law would naturally have been the chief Brehon judge in Ireland. With his strong Galway brogue, his rude wit, his shrewdness, his great power of striking terror, and above all the lawlessness of his disposition he was an ideal Irish judge.

During the whole time of his service on the Bench he was never sent a threatening letter; and when under

the Crimes Act of 1882 it was decided that the Irish judges were to have greater responsibility and they were informed by the Government that steps would be taken to afford them personal protection, and two detectives were put "on" each judge, Chief Justice Morris characteristically refused this honour from the commencement. He adopted the more sensible plan of going about in a pot-hat and pea-jacket, so that it would be hard to take him for a judge. His humaneness was well known, too; and he dwelt with frequent satisfaction upon this good fortune in his judicial career, that during his more than twenty years on the Bench he had never pronounced a capital sentence that was carried out.

When permanent head of the Irish Judiciary he had a great regard for the independence of the Irish Bench, which he was never betrayed into forgetting himself or allowing others to. With any unwarrantable liberties or interference he was impatient, and no anecdote of him is better known than his reception of a distinguished Treasury official who, after a long correspondence on the part of the Department, was sent over to enquire into the expenditure of fuel in the Courts and Judges' chambers. The Chief Justice received him politely and asked him to sit down, and after listening with patience and attention to his complaint, said he would put him in communication with the proper person. He then got up and rang the bell; when the tip-staff appeared he said, as he left the room, "Tell Mary the man has come about the coals."

Before he left the Irish Bench, Lord Morris had gone fifty-two circuits throughout every part of the country, and had been for some time the senior judge, by length of service, on the Bench in England or Ireland. His leave-taking of the Irish Bar in December, 1889, was the occasion of a remarkable demonstration of the respect and regard entertained for him by his colleagues on the Bench, and by



the Bar. He spoke with much feeling of the "wrench" it was. "Just forty years ago, as a young man of twenty-two, I put on for the first time a wig and gown, and, as the expression then was, 'walked the hall of the Four Courts.' Twenty-three years are nearly completed since I became one of Her Majesty's judges. No judge now sits on the Bench of the Supreme Court that sat on it when I joined. For twenty years I sat as a judge and as Chief Justice of the Common Pleas, while for nearly three years I have, as Lord Chief Justice, been the permanent head of the Judiciary. You will understand, then, the wrench it must be, and is to me in now breaking with the surroundings and associations of so long a period." He wound up, after thanking the Bench and Bar for their invariable consideration, by saying "though I must necessarily be domiciled for a considerable portion of the year in London, I do not become expatriated or denationalised. My permanent residence and substantial interests remain in my native country. My nationality has been to me always an honest pride."

On his arrival in London in the winter of 1889-90 to take up his duties as one of the Law Lords in the highest Appellate Court of the Kingdom, Lord Morris, whose social and legal fame were so well known, and whose reputation as a wit and raconteur was unrivalled, was cordially welcomed in all circles of English society. The Cecil Club entertained him as the guest of the evening, Grillion's and other select clubs elected him member. An unprecedented honour was paid to him by the Benchers of Lincoln's Inn and one he greatly appreciated as a compliment to the Irish Bench in his person : they waived the ordinary rule, never before broken except for the complimentary admission of royal and princely personages, and elected him a Bencher of the Inn though he had never been called to the English Bar.

Lord Morris himself would have been the last to claim

the character of an erudite lawyer in the rigorous interpretation of the term, but he always brought to the large and important questions that came before him a breadth of view and a grasp of the facts of life that served as a valuable corrective to super-subtle legal reasonings. In the words of the *Times*:—"Perhaps the public, and even his profession, cannot realize how valuable a check is the presence of incarnate common-sense and good-humouredly cynical contempt for the extravagances of hair-splitting and logic-chopping on the part of some eminent lawyers. The proceedings, too, were occasionally diversified by a sally delivered in the brogue which he never sought to modify. One of these interruptions to grave argument was in the prolonged appeal of *Allen v. Flood*, the trade union case decided in December, 1897, after a two years' sojourn in the House of Lords. The late Lord Herschell had been frequent in rather petulant interruption of the counsel for the respondent. Lord Morris took the opportunity of saying, in a pretty loud voice, and in a way which made laughter irresistible, "I think we can all understand from the present proceedings what amounts to molesting a man in his business." Though usually disposed to agree with his distinguished colleagues, Lord Morris was never afraid of being in a minority, even if it consisted only of himself. In the employers' liability appeal of *Smith v. Baker*, Lord Morris, though agreeing in the result that the workman's appeal must be allowed, concurred with Lord Bramwell that there was no evidence of negligence. But, as that point had not been taken below, it was not, in his opinion, open to argument in the appeal. In *Allen v. Flood* Lord Morris was one of the minority, the others being the Lord Chancellors of England and Ireland. In the recent decision of the House under the Workmen's Compensation Act of *Powell v. Main Colliery Co.* he differed from the Lord Chancellor and four other noble Lords on the con-

struction of that ill drawn statute, and held that the "claim for compensation" under the Act meant the actual initiation of proceedings for compensation. The alternative was the coherence of the different sections, on the one side, and the natural meaning of words, on the other. Lord Morris's reading undoubtedly made the Act more consistent, but the other Lords held that two such different expressions could not mean the same thing, and that a written notice asking for redress was a "claim for compensation." The learned Lord's judgment was forcible and logical, though many will think the actual decision was more satisfactory. Again, in the Scottish appeal of *Wyman v. Paterson*, where trustees of a fund in settlement were held liable for the loss of the fund which had been left in an agent's hand, he dissented from the other five Lords, and held that a "decision against the trustees would be a draconic decision and would be an additional terror to any honest and solvent person acting as a trustee." There is this much to be said in favour of Lord Morris's opinion that there had grown up among a proverbially cautious and prudent people, to use Lord Macnaghten's words, "an extraordinary laxity of practice, which the learned Judges of the First Division reprobate and yet allow." The late Lord's humour was not of the literary kind which finds its way into judgments, but it does bubble up now and again. In the decision of the Judicial Committee in *Cochrane v. Macnish* the question was as to the lawful and unlawful use of the term "club soda," and Lord Morris, who gave the decision of the tribunal, remarked:—"In the manufacture of soda water there is no secret, and frequently no soda." Perhaps his best judgment was the admirable one which he delivered in the Privy Council in *McLeod v. St. Aubyn* in 1899. The decision was referred to in these columns (the *Times*) in comment on the case in which grossly disrespectful language

was used in a Birmingham newspaper of Mr. Justice Darling, and the writer was subjected to a fine. Lord Morris, while affirming the existence, deprecated the exercise of the jurisdiction to commit for contempt of Court on account of scandalous matter published with respect to the Court or Judge. In the proceedings before the late Lord Chief Justice on Mr. Justice Darling's committal for contempt, Lord Morris's words do not seem to have been quoted. He says : 'The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the Judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence when a trial has taken place, and the case is over, the Judge or the jury are given over to criticism.' Later he adds : 'Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them.'"

On his retirement last year, the *Law Journal* said : "It would be easy to name many members of the highest Court in the kingdom who have surpassed him in legal erudition, but it would be difficult to mention one who has displayed a deeper knowledge of life and a sounder common-sense, or who has tempered the austere character of the tribunal with a more charming personality."

From the first, Lord Morris took a keen interest in the politics and affairs of the day. At an early age he was High Sheriff of Galway and a magistrate for his native county. Besides his Parliamentary experiences, to which we have already referred, he exercised much influence for many years in Irish matters. With educational interests in particular he was all his life closely connected. He was

an active and useful member of the Powis Commission of 1868-70 to enquire into primary education in Ireland, and in 1868 was appointed a Commissioner of National Education, on the Board of which he served to the day of his death; and he was in latter years, as being the senior member, its chairman. On the foundation of the Royal University in 1880 he was appointed one of the Senators, and in 1899 was elected Vice-Chancellor of it. And for some years he was a Visitor of Trinity College, Dublin, from which University he received the Honorary Degree of I.L.D. in 1887, at the same time as the Marquis of Londonderry, the then Viceroy of Ireland, and H.R.H. the late Duke of Clarence.

Since 1866 he was a member of the Irish Privy Council, where he did very good work in the judicial committees in connection with light railways and other local matters. On these appeals his intimate knowledge of the local conditions was invaluable. He always opposed so-called improvements in the poorer parts of Ireland that necessitated taxation. In one case he proffered the name of one of the townlands that it was proposed to tax. "*Truskaunna-gappul*," he said, "is its name, and it means 'the place where the horse died of starvation.'" And *Truskaunna-gappul* threw out the project. I think it was in the case of the proposal to tax the poor peasants living along the coast of Galway Bay for an inland railway to Clifden that he said the ratepayers might with more justice be asked to contribute to a railway on the opposite coast of Clare. "There were only eight miles of sea," he said, "between them and Clare, whereas they were separated from the proposed railway by ten miles of impassable bog." And these extravagant witticisms contained much pithy truth.

In these various capacities he cut a considerable figure in the public life of his time, and exercised a controlling power in the affairs of Ireland. His vast experience, his

accurate memory of the political and social history of the country, and his knowledge of the national character made his opinion much sought after. But he always acted a friendly part, according to his views, to his native land, and when he saw any benefit likely to accrue worked with sincerity and zeal in its behalf. In the House of Lords he spoke with great force on the Financial Relations question, an injustice about which he had felt strongly all his life. And in the debate on the Local Government Bill, which he supported, he contributed an interesting account of the Grand Jury system about to be abolished, and of the resident landed gentry who had, in his opinion, worthily managed it; and, inspired to affecting eloquence by his love for Galway, carried against the Government an amendment making it a County Borough. He claimed that he was as national as anyman, but that he did not show it by seeing his country as seldom as possible. Indeed his affection for his old home, where he invariably spent his holidays with his family, was very marked. Like a hare to its form, he always came back to it. He seemed even happier wandering about the primitive surroundings of his western Irish home than in any of those London houses where he was such a *persona grata*. He used to say he was the converse of an absentee, because he went over to England and earned money there, and brought it back and spent it in Ireland. And he in turn was beloved by his tenantry and neighbours whom he would go to any trouble to serve. Was it not related of him that once, recommending someone to the Lord-Lieutenant for a post, and the Viceroy saying: "*Ceteris paribus*, I think I'll appoint your friend." Lord Morris replied, "Oh, never mind your *ceteris paribus*, sure, if my man was as good as the other, there would be no favour." And the esteem and affection in which he was held to the end was strikingly demonstrated at his funeral, attended as it was, not only by his friends and neighbours, but by the whole town of Galway.

Though every generous legislative change had his sympathy, he was sceptical of the many solutions and artificial remedies for the Irish problem which he in a long life had heard "discovered," and promulgated, over and over again. He said he had been listening to talk about the "prosperity of Ireland" as long as he could remember—for over sixty years—and during all that time it had been always just going to come; and, he would add, "When I see the true state of affairs in Ireland and hear of all these panaceas, I am only reminded of the veterinary surgeon's bill on which was entered the item—to curing your honour's horse till it died." For his part he believed that until there was peace and order in the country, no capital would be put in it, nor manufactures and industries successfully started, and that otherwise any amount of social and political changes would leave Ireland where she was, if not worse. "God save Ireland," cried a rebel whom he had sentenced to a term of imprisonment, "With all my heart," said the Chief Justice, "but it is the men who are always shouting 'God save Ireland' that make it impossible for Providence to perform the operation." Lord Morris would have increased rather than diminished the political relations of Ireland to the Empire. He used to argue that Irishmen, now that they had fair play, should take their part, as so many with great distinction have, in the government of the Empire—the common heritage of the people of these islands. He was a strong Unionist, and the illustration he used in order to show his objection to dissolving partnership with England is well known. "Here we are, the partners in a great concern like Guinness's Brewery, with one hand in the till, and nothing will satisfy us but to go and set up a little shebeen of our own." With such views he was no admirer of Mr. Gladstone and his Irish policy, and when someone, with whom he was conversing, described that statesman as a

heaven-born genius, he observed that he "devoutly hoped it would be a long time before heaven was in an interesting condition again."

Yet he was no thick and thin admirer of the government of Ireland and could be scornful of English political rule and interference, as is shown in his celebrated explanation of the cause of the Irish question which his friend Lord Randolph Churchill once quoted with such effect in the House of Commons. "It's the case, you see," he said, "of a very stupid people endeavouring to govern a very clever people against their will, and there will always be a little difficulty about that." When asked what he thought of the various English Chief Secretaries for Ireland: "They all have had one common fault," he replied, "there is not one who, when he comes into my house for the first time, doesn't want to show me the way up my own staircase." He could be a caustic and merciless critic upon political incapacity and folly, more especially in the treatment of Ireland. And he would murder with an epigram pretended statesmen. He used to say that in all the Cabinets he had known he found that with a few notable exceptions the members were men who could never have earned £200 a year at an honest profession.

The truth is that, besides being a brilliant and at times extravagant wit, he was not only a real conservative in politics but also a good deal of a pessimist. He distrusted democratic institutions, particularly as applied to an imperfectly developed country like Ireland. He was not against change but against always changing, or as he once put it against "a ceaseless craving after change for change's sake." He favoured progress of a tentative character, but as regards progress in the abstract, he said: "There were demagogues two thousand years ago; there were tyrants two thousand years ago; there was a millennium soon expected two thousand years ago." In Ireland he said he saw



the smug self-complacency of our rulers on the one hand and on the other the sounding platitudes and shibboleths of professional patriots. As to the economic future of the country, he held that the lack of coal was one of the main and irremediable causes of its poverty; she had to pay so heavily for her motive power instead of digging it up out of the bowels of the earth as England and Scotland do. "I once met a geological fellow," he would say, "who told me that it was in the glacial period the real injury and injustice was done to Ireland, when the great boulders scraped off her valuable minerals into the sea, just as you'd scrape the butter off a slice of bread with a knife. A few pocket mines here and there escaped the glaciers, but they are only like the little bits of butter in the crevices of the bread; it is scraped pretty clean for all that." And then he would go on to expatiate warmly on the unfortunate situation of the country generally. "Why it's not like any other island that ever was made," he would wind up, "instead of a hill, it has, like a saucer, a great hollow in the centre of it where all the water lodges."

Such is an attempt to depict briefly the life and views and work of the striking individuality that has lately been removed from an active and prominent position among us. But, in spite of his professional and other success in life that I have recounted, there is little doubt that he will live in the recollection of his countrymen as one in whom the personality was much greater than any office that he held. His strong and unique character, his rare buoyancy of spirit, his great abilities, his knowledge of human nature in general and of Irish human nature in particular, his versatility, his rich and racy humour, droll sayings, and ready repartee; his absolutely spontaneous wit flashing forth on the slightest provocation or simplest occasion, and his fine native natural way, to say nothing of the brogue, made this exuberant Irishman one of the most attractive

and popular personalities of the day ; and to these qualities, too, he was largely indebted for the position of peculiar influence he attained in his profession and in the public life of his country.

But, above all, Lord Morris was an Irishman. He safely defied anyone, whether drunk or sober, to make any mistake on that point ; and he was richly endowed with the happiest characteristics of his race. A more typical Celt could not easily be conceived. So plain and hearty, and yet so capable, when the occasion demanded it of assuming an air of impressive solemnity and concealing the mercurial temperament beneath a truly judicial bearing. Withal so lively and genial ; was it not Mr. John Morley who chancing to meet him at the time when feeling ran very high over the Home Rule Question, expressed surprise at the cordiality with which he greeted him ? upon which the Chief Justice, with perfect *bonhomie*, remarked, " Ah ! come now, sure I've known many worse—in the dock ;" and yet this vivacious man was not without a melancholy and fatalistic strain. And those who were intimately acquainted with him knew of yet another contradiction in this Celtic nature ; they knew that beneath a rugged exterior and a certain roughness and intolerance of manner and speech there was a heart as tender, as kindly, and as loyal as ever man had.

RICHARD J. KELLY.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW

### Anarchism.

The crime which has deprived the United States of a President whose term of office will be historical as inaugurating a new foreign and international policy for his country, coming as it does after a series of successful and unsuccessful attempts on the lives of Heads of States or persons in similar high positions, has naturally suggested the consideration whether it is advisable for the greater States by mutual and general agreement to take uniform action against the criminal anarchists; and it seems at all events probable that the matter will be seriously discussed between the various Governments. A precedent for concerted action by a number of States for dealing with a common evil or danger is to be found in the treaties and general conventions of the first half of the nineteenth century for the suppression of the slave trade, by which the contracting parties bound themselves to exert every effort for the repression and extinction of an unnatural commerce. The offence of taking or attempting to take the life of a head of a government whether monarchical or republican is certainly analogous to the crime of piracy, in so far that it is committed irrespectively of political, national, or racial considerations, and its authors if not *hostes humani generis* are at least enemies of all human authority wherever it is to be found. The tendency of modern times to set up more and more a common public law of order among the general body of civilised countries, has caused a concert of States on several recent occasions to take joint action for the general peace of the world by intervening as police between two estranged nations and even by setting in order a State whose rulers have shewn themselves powerless to restrain its people from violence to foreign nations and individuals;

and a similar motive might produce an international agreement guarding against a class of offences which though they are generally the work of irresponsible persons can be traced to the fact of these persons' minds being inspired by the influence of educated leaders with the vague idea of overthrowing all constituted authority everywhere. Such offences are already within the scope of extradition treaties, being "not political offences but crimes against the laws of nature, the laws of which all nations regard as the foundation of public and private security"; and it should be possible to frame a general international system of repression and punishment for such cases applicable irrespective of the country where they are committed or of the person attacked.

### China.

The signing of the protocol by the Powers and China relative to the amount of indemnity and the other measures of reparation due for the Boxer disturbances, and the expiatory Chinese missions to the Courts of Germany and Japan on account of the murder of their representatives in Peking, mark the close, it is to be hoped, of the unsatisfactory phase of relations between China and the Powers which began with the "scramble for China" in 1897, and it is satisfactory to learn that, at least so far as Great Britain, France, and the United States are concerned, the booty taken in the Chinese cities by the various national troops has been or is to be restored to its rightful owners. Less satisfactory features of the situation are the facts that the means by which the indemnity is to be paid is an increase in the tariff charges on foreign trade, still mainly British, and that nothing has been done by general agreement between the Powers to define their future rights *inter se* as regards China. Although no date

has been fixed for the determination of the Russian occupation of Manchuria, the Russian Government has repeated its explicit pledge, previously given, that the occupation is only a temporary one; and the fact that it embraces one at least of the Treaty ports (Niuchwang) should serve to some extent to prevent any single Power from interfering with the trading rights to which all the others are entitled by treaty.

### South Africa.

Lord Kitchener's proclamation to the Boers still in the field that after September 15th leaders of commandos continuing in arms will on capture be exiled from South Africa, and in the case of burghers in arms that the expense of maintaining their families will be charged upon their property (in pursuance of which notification has now been given that such properties will be realised forthwith), proceeds on lines which can be justified by the strict laws of war, in that a belligerent can keep his prisoners of war in safe custody anywhere he pleases, and the general rule of International law that immovable property of combatants is not to be confiscated is not infringed; while it can also be said that the removal of Boer families from their homes to special centres (on account of which the expense is being incurred) was required not only for military considerations but also for the sustenance and protection of those non-combatants, which would have been precarious otherwise. Although the proclamation does not seem to have produced much visible result, it indicates a more satisfactory course of action by the military authorities, namely, treating the Boers as combatants until hostilities come to an end, instead of that apparently indicated in the earlier proclamation, namely, treating them as rebels, for which a necessary preliminary condition according to International law is

the possession of complete military control of the country by the conqueror. The war is one of conquest, and the rules of war prevail until all organised resistance can be said to be definitely at an end. Such acts as the wrecking of trains are justifiable so long as they are done with a direct military object and part of a regular plan of operations, and not the work of unorganised bodies intent on doing as much wanton damage as possible; and so long as concentrated bodies of the enemy resist the British forces, it seems difficult to say that these are not, on the face of them, legitimate acts of warfare. It must be remembered, however, that in order to secure the rights of belligerents for the forces carrying on guerrilla warfare they must act according to the recognised rules of war and under the directions of responsible leaders; and when circumstances make it clear that resistance cannot lead to a successful result, International law can refuse to ascribe a national character to persons who belong to a State no longer recognised by others as still possessing organised existence.

### **Naturalization.**

Perhaps the most noteworthy change recommended in the Report of the Committee of Government officials appointed to consider the sufficiency of the present British law governing the question of British nationality is the one that the extension of the transmission of nationality by parentage to grandchildren of British born subjects made by the Statute of Anne should be abolished, and the old law of Edward III., giving this privilege to children only, should be restored, with the further limitation that the father, besides having been born within British dominions, must also be a British subject at the time of the child's birth abroad. The advantage in International law of this change would be to diminish the risk of double

nationality; and in view of the now generally prevailing facilities for changing nationality, little purpose is served by the State extending its claims to allegiance to the extent that policy was thought to require when the principle *nemo potest exuere patriam* was in full vigour. No change is recommended in the Common law rule—which before the Code Napoleon was the general rule of Europe—fixing on a person the nationality of the place of his birth; but the general criterion of original nationality in modern systems of law is parentage and not place of birth; and the Report advocates the adoption of a simpler procedure than the present provision of the Naturalization Act of 1870 allowing a person born in British dominions, but becoming at birth by parentage or otherwise a foreign subject, to revert to that nationality of parentage by a declaration of alienage (a right which is also allowed to children born to British subjects out of British dominions) and similarly the simplification of the conditions now required to be satisfied by minors wishing to acquire or lose British nationality whose parents have become naturalized British subjects. Other suggestions, which may well be given effect to, are that all differences in status between natural-born and naturalized British subjects should be removed; that residence in any British possession (saving the powers of the local legislature to specify the conditions on which it will confer all or some of the rights of British subjects within its jurisdiction) as well as in the United Kingdom should qualify aliens for naturalization; that the British dominions for this purpose shall apply only to territory which is British by conquest, cession, or occupation, but not to territory where British ex-territorial jurisdiction exists ('by treaty, capitulation, grant, usage, sufferance, or otherwise'); and that with regard to births on board British ships, persons born on board British ships of war in any waters, or on

board British merchant ships whether on the high seas or in foreign waters should be declared to be British subjects, and (correlatively to this last provision) that persons born on board foreign merchant ships in British waters shall not, because of that circumstance only, be so considered. This will be admitted to be an unobjectionable application of the theory of the territoriality of merchant ships.

On two points raising directly considerations of International law, namely, (1) what should be the extent and character of the protection to be given to a person in a country, where, although he has acquired British nationality he still owes allegiance, and (2) whether a wife's nationality should be determined by that of her husband, the Report advisedly confines itself to the Municipal law aspect; but at the same time it expresses the view that cases of double nationality should be restricted as much as possible by adopting the principle that naturalization in one country carries with it the loss of prior nationality, and in a case of double allegiance that that of the country where the person resides for the time being is paramount. It is, however, common knowledge that in such cases of double nationality where the former country imposes compulsory military duties upon its subjects, it claims their allegiance until these duties are satisfied: and our present law is careful to make a grant of British nationality effective in the new subject's country of origin only so far as the law of the latter does not claim his allegiance. Our present law answers the second question above in the affirmative in all cases, though it did not do so before 1870 in the case of an Englishwoman marrying a foreigner; and this is now the rule prevailing generally.

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#### International Law of Marriage.

An interesting discussion at the Glasgow Conference of the International Law Association was that treating of an



uniform international marriage law originated by the papers by Mr. Justice Phillimore and Professor Goudy respectively, which gave a suggestive exposition of the principles governing the subject. Mr. Justice Phillimore, advocating the general adoption of the personal law (the Continental view) as the law to decide the essentials of marriage; instead of the *lex loci* (the American view), as being the one with which English law seems to be most in harmony, expressed his own preference for the law of nationality instead of the law of domicile being adopted as the general law, pointing out that domicile was taken as the test instead of nationality necessarily at a time when a man could not change his nationality as he can now, and that this criterion is the one being adopted by France, Germany, and Belgium. The paper also expressed the opinion that the provisions of the *lex loci* must be complied with not only as regards form but also as regards essentials, in addition to the personal law in this respect, and pointed out that the increasing tendency of the French Courts to regard the innocent omission of the formalities of publication (*actes respectueux*) required by French law in cases where French subjects contract marriages abroad as matters of form, is conceived in the true spirit of international comity and to the interest of international agreement on this point: and after considering the international effect of special prohibitions of particular marriages by particular nations on grounds of policy, and expressing disapproval of the diplomatic or consular marriages allowed by British law as not deserving of or obtaining international recognition, it concluded by urging that the only necessary marriage ceremony for legal purposes should be a civil one performed by a civil officer and recorded in a civil register. This last proposal was also supported by Professor Goudy, but was opposed (among others) by the Solicitor-General for Scotland as being con-

trary to the present tendency in Scotland in favour of religious marriages, and by Professor Bensa, of Genoa, who thought it sufficient to make only registration of the marriage compulsory ; and it was urged by Dr. Murray that as in Scotland a marriage is simply a civil contract, whether regular or irregular, registration of it should be the foundation of its international recognition, and not the mere evidence of it. However legally desirable may be the proposal to allow only one uniform legal marriage ceremony, necessarily a civil one (which Mr. Joseph Walton, K.C., said from the Nonconformist point of view works satisfactorily here) it must be recognised that at present it would have slight prospect of general adoption, when it is remembered that at the official Conference held at the Hague in 1894 and 1896 between representatives of the Continental States with a view to agreeing upon general uniform rules in certain branches of private International law, it was found impossible to obtain unanimity on this point owing to the dissent of representatives of countries such as Bulgaria and Servia and Russia, which only recognise religious marriages. This fact may be thought to be sufficient justification for our domestic legislation allowing the validity of our diplomatic or consular marriages. The discussion, if it did nothing else, at all events produced an admission from the Scottish lawyers that their own law did not give sufficient consideration to questions of form in allowing the mere expression of consent by the parties to constitute a valid marriage contract ; and Mr. Justice Gorell Barnes suggested a practical reform in our procedure in matrimonial causes, namely, that the certificate of a foreign marriage given by the proper authority when produced in our Courts, should have the effect of proving not only the fact of that marriage, but also the validity of it according to the law of that country. It is interesting in this connection to observe that the Bishop of London has

recently directed the clergy of his diocese not to celebrate marriages of foreigners with British subjects in that diocese without being satisfied by a consular certificate or other proper authority, that the conditions prescribed by the law of the foreign party to the union as to publication have been satisfied, and in the case of marriages by licence, in such cases the Bishop's Chancellor requires the same condition to be observed.

G. G. PHILLIMORE.

### Execution of Foreign Judgments.

The discussion of this subject at the Glasgow Conference proceeded on the lines of a draft general form of international convention for the mutual enforcement of a certain class of judgments, namely those for a payment of a certain sum of money whether by way of debt, damages, or costs, by one party to another. This draft was submitted by the English members of a committee of the Association appointed at Rouen, in 1900, to consider this question, and it had at least the merit of revealing the main controversial points on the subject and so preparing the way for a definite conclusion later. The opinions expressed by the French, Scottish, Belgian, Italian, and English lawyers present, showed that the difficulties in the way of, at any rate, a partial international agreement are such as should be removed by mutual concession and special arrangements for special cases. The course adopted by the Association of attempting to frame a general form of international agreement has been criticised adversely by such a well-known authority on the subject as M. Lachau, of Paris, who has consistently advocated the course of promoting treaties for this purpose between two States only at a time, until the principle can be held to be entitled to recognition by general international practice, and the

Franco-Belgian treaty of 1900, due mainly to M. Lachau's initiative and subsequent work, is a most valuable result of work by jurists on these later lines. But it seems also to be of value to find a common ground on which different legal systems can meet. Diplomatic and executive authorities can then adapt to particular cases the general principles stated as the opinion of jurists. The Arbitration Convention of the Hague, for example, owed as much to the various general schemes elaborated by unofficial bodies as to the particular Arbitration treaties which preceded it.

The draft convention underwent discussion mainly on three points : Firstly, as regards the standard of jurisdiction (*compétence*) to pronounce the judgment of which execution is sought in another country, the scheme proposed as an addendum the rules recognised in English law ; but on this point some of the Continental lawyers were not disposed amongst other things to accede to the principle recognised in American and English law that the mere presence of a defendant within a territorial jurisdiction when the suit was instituted makes a court of that country competent to pronounce a judgment against him, of which, under the general principle, enforcement could be demanded elsewhere. It was pointed out that this difficulty could be obviated by making this rule of jurisdiction optional. It would certainly seem that at the outset for the purposes of a general form it would be best to have as few, and as generally recognised rules of jurisdiction as possible. Secondly, with regard to the difficult question of the effect to be given to an allegation by the defendant that the judgment was obtained against him by fraud, the draft scheme followed the principle that matters capable of being remedied by appeal in the foreign country ought not to be gone into by the Court

asked to enforce the judgment, and proposed to cast the burden of establishing this defence upon the defendant. No doubt since *Vadala v. Lawes* the rule of English law is that an allegation of fraud allows the whole of the circumstances of the case to be reopened ; but if the rule of non-appeal were given effect to as above, this would diminish appreciably the risk of this right being abused. A third matter for contention was revealed in the suggested provision of the scheme that, besides the proof of the foreign judgment as a fact by production of a certified copy of it, the plaintiff should also have to produce a certificate from the foreign court in effect declaring that the judgment in question was an effective one at the time when execution was sought, and that its enforcement against property of the defendant outside that jurisdiction was *bonâ fide* required for the purposes of justice. The motive for this provision was to avoid the necessity of proving matters before the Court applied to for execution, which lie more naturally within the province of the Court giving the judgment. It is submitted that the principle of, as it were, apportioning between the two Courts the formalities necessary to ascertain the rights of the plaintiff without detracting from those of the defendant, is sound in theory and would be workable in practice. All these are difficulties which it is reasonable to expect can be surmounted by the joint efforts of lawyers of different countries ; and the Conference will have accomplished something if it has cleared the ground for future discussion by directing attention to the comparatively few points of disagreement and the many points of agreement already existing.

In the contribution to the discussion of the subject which came from Professor Corsi, of Pisa, the question whether a draft general convention should afford the *maximum* or the *minimum* of international legislation was mooted. It seems to the writer that such a draft should be confined to an

expression of the common factor of international opinions, and this not merely to promote an agreement at a Conference. The sanctions of an international agreement are—first, the agreement of those jurists to whom the proposal is submitted; secondly, the recognition by international adoption; and thirdly, the non-deviation on material points when any international adoption takes place. In other words, whenever an agreement between two or more States materially departs from the provisions of a general convention, that agreement tends to become the international precedent, and gradually the convention becomes a dead letter. In practice the course least open to objection appears to be to frame a convention on minimum lines, and to add recommendations upon controversial points.

E. W. SINCLAIR-COX.

### **Permanent Arbitration Treaties and the Hague Conference.**

This subject was discussed at the Glasgow Conference in connection with a proposal for an Anglo-French treaty. The proposal, due to Mr. Thomas Barclay, of Paris, well known as an international lawyer, has been received with great favour in Paris, and was brought before the British public in an article by Mr. Barclay, which appeared in the *Fortnightly Review* of last June. The project has since been approved by a unanimous vote of the Associated Chambers of Commerce of the United Kingdom, at Nottingham.

The discussion at the International Law Conference raised an important point as to the construction of the Hague, "Convention for the Peaceful Regulation of International Conflicts." Article 19 of that Convention is as follows :—

*Indépendamment des Traités généraux ou particuliers qui stipulent actuellement l'obligation du recours à l'arbitrage pour*

*les Puissances signataires, ces Puissances se réservent de conclure, soit avant la ratification du présent Acte, soit postérieurement, des accords nouveaux, généraux ou particuliers, en vue d'étendre l'arbitrage obligatoire à tous les cas qu'Elles jugeront possible de lui soumettre.*

Dr. Evans Darby, the secretary of the Peace Society, in a paper read at the Conference deprecated "agitation to set aside the Hague Convention by new agreements between the separate States." He relied on Article 21 of the Hague Treaty: "La Cour Permanente sera compétente pour tous les cas d'arbitrage, à moins qu'il n'y ait entente entre les Parties pour l'établissement d'une juridiction spéciale d'arbitrage" (the English translation of which runs: "The Permanent Court shall have jurisdiction of all cases of Arbitration unless there shall be an agreement between the parties for the establishment of a special tribunal"). Dr. Darby contended that "new agreements cannot be more binding; and, as formed between two individual States, they must have less dignity and moral force than deliberations and definite contracts formally conducted and concluded between a large number of States."

On the other hand, the writer of this note pointed out that Article 19 in its present wide form was introduced into the Hague Treaty in consequence of the objection of Germany to all obligatory arbitration in order to reserve to other Powers, which did not entertain a similar objection, the right to make obligatory arbitration Treaties amongst themselves. The Lord Chief Justice, who presided at the discussion, being asked his opinion as to the contention that special treaties such as that proposed between England and France would set aside the Hague Convention, said it was "quite clear that arbitration under the Hague Convention is entirely optional, that there is no compulsion," and that Article 19 "abundantly proves that the

matter is not concluded." Lord Alverstone had already, in his inaugural address, referred to the General Arbitration Treaty signed between the British and United States Governments in 1897, which failed to be ratified owing to the want of the necessary two-thirds majority in the United States Senate, and expressed the hope that it might "still be a starting point and afford common ground on which the citizens of the United States and the subjects of His Majesty the King may be able to meet and adjust differences should they unhappily arise." The Conference adopted two resolutions, the first favouring all attempts to widen the scope of arbitration as a permanent means of solving difficulties between States, the second regretting the failure of the efforts to carry a permanent treaty of arbitration between Great Britain and the United States, trusting that the Government of the two countries will continue their efforts for that purpose, and expressing the opinion that it is desirable and opportune that efforts be made to bring about the conclusion of a treaty of arbitration between Great Britain and France. It is understood that Lord Pauncefote, on his return to Washington, will be charged with the resumption of negotiations for a permanent treaty of arbitration with the United States which would naturally take precedence of any similar treaty with France.

J. G. ALEXANDER.

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### International Marine Insurance.

The work done by the Conference upon the subject of International Marine Insurance resulted in the adoption of a body of Rules which are to be styled the "Glasgow Marine Insurance Rules 1901." The Scheme of these Rules, put forward at Buffalo in 1899, and again considered at Rouen in 1900, is to cover those portions of the law of



Marine Insurance on which the systems in force in the various Maritime Countries do not agree. The proposal is that, by express incorporation of the Rules, policies may have the same legal effect wherever they may be underwritten. At present a policy made, say, in France, has a materially different effect from one made, in the same terms, in England. That arises from the difference of law in the two places. But it is competent to the parties to agree to adopt a system of law of their own, which may be neither the law of France nor the law of England. They can do that by expressly saying so in their policies. And the Glasgow Rules are intended to supply a code which will take the place of those portions of the law on which the important differences arise.

The aim is to bring about uniformity in Marine Insurance law, and so to enable men who are seeking insurances, whether of ships or cargoes, to effect them in a wider market. At the same time the opportunity occurs, while adopting a body of law which will harmonise the conflicting systems, of selecting the best features of each.

The Glasgow Rules, where adopted, will make some important changes in the effect of an English policy. Apart from minor points, these changes are mainly (1) in the conditions of a constructive total loss; (2) in the nature and effect of the warranty of seaworthiness. English law at present treats a loss as partial only, unless the thing insured is actually lost, or destroyed, as a thing of the kind insured, or unless the cost of reinstating it would exceed its value when reinstated. In other countries the rule is more favourable to the assured; the loss is treated as total, or the assured is allowed to abandon and claim the full amount insured, where a loss has happened amounting to a certain proportion of the value of the insured subject. That proportion is one-half in the United States, three-fourths in most European States. The

Glasgow Rules adopt the foreign view, and provide that a loss shall be treated as total where the subject insured has been damaged to the extent of three-fourths; or where the cost of its recovery and reinstatement would amount to three-fourths of its value. There are practical reasons for accepting this change, apart from the ground that in no other way can uniformity be hoped for. The English Rule, though logically the sound one, does not make allowance for losses which the assured suffers collaterally to the main loss. Suppose a ship badly damaged, but not so much as to be not worth repairing; the repaired ship will be worth more than the cost of repairs; on the English view she is not totally lost, either actually or constructively. But the loss to the shipowner by the accident is not merely the cost of repairing; in addition he loses the use of his ship until she has been repaired. It is, therefore, thought not to be unfair to allow him to abandon her to the insurers, and claim payment in full, when the cost of repairing is something less than the value of the repaired ship; and the three-fourths rule, found in other countries, has been adopted.

The other principal change is in the warranty of seaworthiness of the ship, which, by English law, is implied in voyage policies on ships, and in policies on cargo. The Glasgow Rules abolish the warranty in cases of cargo-policies; and in ship-policies they cut it down from the absolute warranty of seaworthiness, on sailing, to an undertaking by the assured that care will be taken to make her seaworthy. At the same time the harsh English rule which, differing from the laws of Continental Europe, makes the whole validity of the policy dependent upon the warranty having been complied with is got rid of: the insurer is only relieved from liability for losses which arise in consequence of a breach of the warranty.

These changes, it is thought, are required, not merely

for the sake of uniformity, but in order to make the law fair. At the same time it was proposed, in the Rules as presented to the Conference, that this warranty of seaworthiness should be a term of all policies on ships, in the absence of express agreement. The English distinction between time-policies and voyage-policies, in this matter, is recognised in no other country; and no very substantial reason for it can be given. It was proposed to get rid of it in these Rules, leaving the parties to insert special terms where, in any particular trade, or with any particular class of ships, it is convenient to insure free of any warranty of seaworthiness. There would have been nothing to prevent such a term from being specially agreed, for instance by inserting such words as "seaworthiness admitted." But the Shipowners' representatives at the Conference, and they were in strong force, were not content with that; they have become accustomed to insure their ships "on time," and to be free of any warranty; and they insisted that the rule as to seaworthiness should apply only to voyage policies. A keen debate on this question resulted in a triumph, on division, for the Shipowners; and the Rule as passed by the Conference leaves the warranty in the case of time-policies untouched.

We thus have an important flaw in the operation of these Rules in relation to time-policies. The matter not being expressly dealt with, the warranty to be implied must depend on the law of the country in which the policy may be made, even though it be made subject to the "Glasgow Rules." And thus the scheme of giving the policy the same effect wherever made is to that extent defeated. Even as between England and the United States that is so. A time-policy made in the United States will imply an absolute warranty of seaworthiness on sailing, as a condition of the policy's effectiveness, while the same insurance in England will

have no warranty on the point at all. Though both may be on "Glasgow Rules," a special clause will be needed when a ship is insured partly in one country, and partly in another.

Another change in the Rules as proposed was made by the Conference at the insistence of members who spoke for France and Belgium. The Rules proposed definitely to adopt the English rule that where a loss is proximately caused by a peril insured against, it must (apart from the defence of unseaworthiness) be paid for by the insurer, although it may have been brought about by negligence of the assured or his agents, or even by wilful acts of his agents. This was objected to on the ground that, without legislation, such an agreement would be without effect on the Continent; it would enable the assured to obtain indemnity against his own gross neglects, and that would conflict with the law of public order. The proposed rule was, therefore, struck out, and the rules as passed are silent on the point, thus leaving the matter to be determined variously by the differing laws. This is not important as between England and the United States, as the law on the point in those countries is in accord; but the omission seriously affects the usefulness of the Rules as between those countries and the Continental States of Europe.

On the whole it may be said that an important practical step has been accomplished towards the desired unification of this branch of law. It remains to be seen whether the scheme of the Conference will be adopted by the merchants, shipowners, and underwriters who are practically concerned with insurance business.

T. G. CARVER.

## VIII.—NOTES ON RECENT CASES (ENGLISH).

**I**N *Waldock v. Winfield* (L.R. [1901] A.C. 596), the plaintiff had been injured by the negligence of the driver of a van, and the question arose as to who was the right person to be sued. The horse and van which had done the injury were the property of the defendant, who had entered into an agreement with M., an ironmonger, by which he undertook to supply vans which were "to arrive at 6.30 a.m. each working morning in complete working order, and with good capable men to drive and take charge of same. Vans, horses, and all necessaries being the property of W. Winfield. The man in his employ, and all charges and claims whatsoever in reference to the vans, horses, and men, being paid by W. Winfield, and he to be responsible for the same." Another part of the agreement stipulated that M. was "only to be responsible for the due payment at the rate of £420 per annum." On one of the defendant's vans arriving at M.'s factory, the latter ordered the driver to load an iron girder on to the van, and deliver it at the works of W. The driver while delivering the girder, through negligence allowed it to fall and injure the plaintiff. The judge at *Nisi Prius* left several questions to the jury, and eventually gave judgment for the defendant, the jury having found as a fact that the defendant had parted with the control of his servant at the time of the negligence complained of. The Court of Appeal (Smith, M.R., Vaughan Williams and Stirling, L.JJ.) allowed the appeal of the plaintiff, holding that the defendant was liable on the right construction of the agreement. The particular point as to control should not have been put to the jury, it being a question of construction of the document. This decision is in accord with the earlier case of *Quarman v. Burnett* (6 M. & W. 499), where the owners of a carriage, being in the habit of

hiring horses from the same person to draw it for the day or drive, and the owner of the horses used to provide a driver, the latter caused injury to a third party by negligence. It was there held that the owners of the carriage were not liable. Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant, and that person is undoubtedly liable, who stands in the relation of master to the wrongdoer. He it is who has selected him as his servant from the knowledge or belief in his skill and care, and he can remove him for misconduct. The servant is bound to receive and obey his orders. Therefore no other person than the master of such servant can be liable, and this is so on the simple ground that the servant is the servant of the master, and this act is the act of the master. A person entering into a contract with the master does not raise the question of master and servant at all. He simply is not liable for the servant's acts.

This point of law, simple as it now appears, has not been without its difficulties to our judges. In *Laugher v. Pointer* (5 B. & C. 517) the judges were equally divided. There the owner of the carriage hired a pair of horses from a stable-keeper to draw it for a day, and the latter provided the driver, who was paid by gratuities given by the owner of the carriage. Lord Tenterden and Littledale, J., held that the owner of the carriage was not liable to be sued for an injury done by the negligent driving of the driver. Bayley, J., and Holroyd, J., were of the contrary opinion. The case of *Waldock v. Winfield* is not distinguishable from the above, and falls within the rule referred to by the two former judges. Lord Tenterden said, "In the case now before the court the hirer makes no contract with the coachman, he does not select him, he

has no privity with him, he usually gives him a gratuity, but he is not obliged by law to give him anything, and from thence I conclude that the coachman is not the servant of the hirer; and if the coachman is not the servant of the hirer on such an occasion, but is chosen and intrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law what he certainly has not in fact, the conduct and management of the horses." It should not, however, be forgotten that there may be special circumstances which may render the hirer of horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or by ordering the servant to drive in a particular manner, which occasions the damage complained of. It is cognate to this question to mention that the Metropolitan Hackney Carriage Act, 1843 (6 & 7 Vict. c. 86) renders the registered proprietor of such vehicle liable to third persons for the negligence of the licensed driver as if the latter was his servant, although in fact they stand in the position of bailor and bailee (*Keen v. Henry* [1894] 1 Q.B. 292)

The Divisional Court (Kennedy and Phillimore, JJ.) decided in *Davidson v. Hill and others* (L. R. [1901] 2 K.B. 606), over-ruling *Darling, J.*, that the intention of the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93) was to confer a benefit upon foreign as well as upon British subjects, and that as against a British wrongdoer a foreigner might maintain an action under this statute, and that a plaintiff although an alien is entitled to maintain such an action. The old rule of law was that if the injury inflicted on a person was of so extreme a nature as to cause his death, the person guilty of or responsible for the negligence

escaped from his liability to sustain an action, upon the principle that it was an action personal to the injured individual; and, he having died, the right to bring it ended with his decease, the maxim being *Actio personalis moritur cum personâ*. The law upon this point was altered by the above Statute, formerly known as Lord Campbell's Act, and amended by 27 & 28 Vict. c. 95, which enacts that whenever the death of a person is caused by a wrongful act, neglect, or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages, in every such case the person guilty of negligence or otherwise liable, shall be liable to an action for damages at the suit of the executor or administrator of the deceased or other persons mentioned in the Act for the benefit of his family. In the above case a collision had occurred between the steamship of the defendants and a Norwegian barque on the high seas. The widow of one of the crew of the barque, who was drowned by the negligence of the steamship, brought an action against the owners of the steamship, under the above Statute for the benefit of herself and her six children. The plaintiff contended that the Statute was intended for the benefit of aliens as well as of British subjects, on the authority of *The Explorer* (L. R. 3. A. & E. 289). While the defendants supported by the judgment in *Adam v. British and Foreign Steamship Co.* (L.R. [1898] 2. Q. B. 430) denied that an alien could bring an action under the above Act. In the Court below, judgment was given in favour of the defendants, but this the Divisional Court overruled as above mentioned. It should, however, be remembered that the collision did not occur within British waters. When such is the case a statute general in terms and intended for the protection of navigation will admittedly apply to foreigners, as held in *The Milford* (Swa. 367). But *The Zollverein* (Swa. 96) lays down a contrary rule.



There a British and foreign vessel having collided at sea, out of British waters, under circumstances in which by the general maritime law the foreign vessel was at fault, but by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) the British vessel was at fault, it was held by the Court that the Statute did not apply to foreign vessels, and further that the general maritime law must prevail. As a consequence, the British vessel was entitled to be recompensed for the damage she had sustained. The cases, moreover, of *Gibbs v. Potter* (10 M. & W. 70), *Cope v. Doherty* (27 L. J. Ch. 600), and the *General Iron Screw Collier Company v. Schurmanns* (29 L. J. Ch. 887), are adverse to the view taken by the Divisional Court.

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A very important case for railway travellers was decided in *Dyke v. South Eastern and Chatham Railway Co.* (111 L. T. 252), arising through the plaintiff when about to purchase her ticket at the railway station, leaving her luggage in the charge of a railway porter, which comprised (*inter alia*) a dressing-case, worth £240. The defendants pleaded that as the dressing-case was of more than £10 value and contained jewellery, and as its value had not been declared, they were not liable for more than £10. They relied on the provisions of section 1 of the Land Carriers' Act, 1830. That section provides that a common carrier shall not be liable for the loss of or injury to certain articles, among them jewellery, contained in any parcel or package which shall have been delivered either to be carried for hire, or to accompany the person of any passenger, in any public conveyance when the value of such article shall exceed the sum of £10, unless at the time of the delivery thereof at the office of such common carrier, or to his servant for the purpose of being carried, or of accompanying the person of any passenger the value and nature of such property shall have been declared by the person delivering the

same, and an increased charge paid, or engaged to be paid. The plaintiff argued that this section did not apply to passenger's luggage carried free up to a certain weight, and that the preamble of the Act, and the section itself showed that the section was only intended to apply to goods sent by the carrier unaccompanied by a passenger or to goods taken by the passenger himself in the stage coach or other public conveyance, and therefore did not apply to the present case. The plaintiff relied on *Flowers v. South Eastern Railway Co.* (16 L.T.R. 329) and *Richards v. London, Brighton and South Coast Railway Co.* (7 C.B. 839). Lord Alverstone, C.J., on further consideration, held that both on the construction of the Carriers' Act and on the authorities, the Act applied to luggage carried by passengers and therefore the defendants were not liable. This decision is the only decision which could possibly be arrived at on the facts and under the existing Law. The Act in question appears to be unsuited to the conditions of modern railway traffic, and on the other hand the enumeration of the articles within the statute is imperfect and requires revision. On the other hand the charges which the Companies *may* make are subject to no limit in law and have not infrequently been prohibitory in fact. The whole question of the operation of the Act was considered by a Committee of the House of Commons, which was appointed in 1875, and finally reported in 1877 to the effect that the terms of insurance adopted by Railway Companies was practically prohibitory, and that a maximum rate of insurance ought to be fixed by law; that silk and silk goods ought to be omitted from the Act, and that if a proper rate of insurance should be fixed by law, section 8 of the Act, as to the felonious acts of the servants of a Railway Company ought to be repealed. But on the representatives of the principal Railway Companies proposing to the Committee to bind themselves for a period

of five years, to insure all goods within the Act upon certain moderate terms and at fixed rates, and not to alter such terms without notice to the President of the Board of Trade, the Committee forbore from recommending immediate legislation. When this legislation does take place the further blot elucidated by the above judgment will, we hope, be removed.

A very peculiar case was decided by Buckley, J., in *Rowland v. Chapman* (36 L.J. 379) where an agent for the purchaser took a secret commission from the vendor. Seven persons had formed themselves into a syndicate to buy a certain property, and deputed one of their number, named Martin, to negotiate the purchase with the vendors. He eventually arranged for the purchase of the property from the vendors for £18,000, and four contracts were executed by the vendors and purchasers for the purpose of carrying out this arrangement. Six of the purchasers subsequently discovered that Martin had entered into an agreement with the vendors to receive from them a commission on the purchase money at a percentage amounting altogether to £322. The six purchasers, therefore, commenced an action against the vendors and Martin, claiming rescission of the contracts and to recover the amount of the commission from Martin. He subsequently offered to account for the commission so received, but the question of the right of the purchasers to rescind remained. It was argued for the plaintiffs that as soon as it was proved that the purchasers' agent had received a commission from the vendor there was an end to the contract so obtained, and that it was not necessary to show that interest and duty were in conflict, or that the commission was the cause of the contract. Buckley, J., held that in order to have a right to rescind, the plaintiffs must show

that their agent had an interest conflicting with his duty, because where the interest of the agent is not in conflict with his duty the principles relied on by the plaintiffs did not apply. In the present case seven purchasers had to provide purchase-money in seven equal shares, and when Martin negotiated with the vendors his position was that if he obtained the property for £100 less than the price asked, he lost 30s. in commission for himself but gained for the purchasers £100. As regarded the price, his interest, being himself a purchaser, was to pay as little as possible, and by every £100 reduced from the purchase money he gained as purchaser one seventh, *i.e.*, about £14, whereas he lost 30s. in commission. The net result was that he gained £12 10s. on every reduction of £100. His duty, therefore, to his co-purchasers was to get the property at the lowest possible price, and his personal interest was the same. Martin's interest, therefore, was identical with the interest of his co-purchasers, and so the plaintiffs had no case for rescission of the contract on the ground that Martin had received a commission from the vendors. The distinction is appreciable, but a very fine one, and we venture to think may not be unattended with danger in every-day life. In *The Emma Silver Mine Co. v. Grant* (L. R. 11 Ch. Div. 918) Lord Justice James said: "Upon any person in a fiduciary position it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I see no difference in this respect between a promoter and a trustee, steward, or agent."

SHERSTON BAKER.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*History of the Military Pension Legislation in the United States.*

By WILLIAM HENRY GLASSON, Ph.D. . New York : The Columbia University Press. 1900.

This is one of an interesting series of "Studies in History, Economics and Public Law" issued by the Columbia University, and is marked by the thoroughness which characterizes all their publications. It has a special interest for us at the present time, as a not improbable result of the long warfare we are engaged in in South Africa will be considerable alteration, if not a complete remodelling of *our* Military Pension System. The development of the American system is therefore a most valuable object lesson to us, though some causes operated in the United States which are not likely to arise here. To any one who has not studied the question, it is rather startling to read that "the maintenance of the Military pension system of the United States has cost since the close of the Civil War about two and a-half billions of dollars. At the present time, nearly one million names are borne upon the national pension rolls, or, approximately, one in seventy-five of the population of the country. The annual expenditure for pensions is, roughly speaking, one hundred and forty million dollars." In order to follow the development of the system it is necessary to define the various kinds of pensions. These the Author divides into *invalid* or *disability pensions* and *service pensions*. "An invalid or disability pension is one granted to a soldier on account of wounds or injuries received or disease contracted in the military service. Service pensions may be divided into *pure service pensions* and *limited service pensions*. The former are granted for a specified length of military service without regard to any other consideration. Limited service pension laws require a specified length of service and also some other qualification or qualifications, such as indigence, inability to perform manual labour, inability to earn a support, disability in some degree incurred since the termination of the war, or the attainment of a certain age." There is an interesting notice of the early colonial laws providing for the relief of disabled soldiers, commencing with an enactment of the Pilgrims at Plymouth in 1636. The first national pension law was in 1776. It was passed for the purpose of encouraging enlistment in the revo-

lutionary army, and promised half-pay for life or during disability to any officer, etc., losing a limb or being rendered incapable of earning a livelihood. Washington was a strong advocate of a "half-pay and pensionary establishment," which he urged on Congress as a means of re-animating the languishing zeal of his officers. As the result of his appeal, Congress in 1778 voted "to all commissioned officers who should continue in the service of the United States to the end of the war, half-pay for seven years after its conclusion." In 1780 such half-pay provision was extended to the widows, or orphan children, of such officers as had died or should die in the service; and in the same year, on the direct representation of Washington, the period of half-pay was extended to life. In 1782 a further provision was made for invalid soldiers by pensioning them at the rate of five dollars per month. It is curious to note what very great dissatisfaction was caused by the grant of half-pay for life, and the result was that by the Commutation Act, 1783, the half-pay was commuted for five years' full pay. A curious disagreement between Congress and the Judiciary took place under the general pension Act of 1792, which is worth reading, but the greater part of the Act was soon repealed. In 1806 a comprehensive Act was passed dealing with invalid pensions, and the rates of pensions were increased in 1816. A new principle was introduced in 1818 when the service pension system was inaugurated, which has, as was predicted at the time, become "a burden which posterity regrets." The arguments in favour of this measure were, the existence of a surplus, and appeals to the sympathy of Congress such as the following piece of choice eloquence. "Permit not him, who in the pride of youth and vigour, wasted his health and shed his blood in freedom's cause, with desponding heart and palsied limbs to totter from door to door, bowing his yet untamed soul to meet the frozen bosom of reluctant charity." These arguments prevailed, and the Act of 1818 provided that any person who had served till the close of the Revolutionary War, or for nine months or longer at any period of the war, and was "in need of assistance from his country for support" should receive a pension for life of from twenty to eight dollars per month. The result of this Act was an eager rush for pensions, flagrant abuses, and frauds, but although some attempts were made to check them, the tide of liberality was running too strong, and aided by the same argument as before of financial prosperity, the Act of 1832 was passed, which granted to all who had served during the Revolutionary war

for a total term of two years, full pay for life. This measure was followed by the same scandals as the Act of 1818. There was no general legislation in favour of widows or children till an Act of 1836, followed by other measures which became more and more liberal, and provided, first, for "those widows who married during the Revolution, then for those who married prior to 1800, and finally, for all Revolutionary widows, regardless of the date of marriage." We have no space to notice the Legislation based on service between 1789—1861, but must go straight to the Civil War Pension Legislation. "The fundamental pension law for all claims arising out of service in the Civil War" was passed in 1862. As might be expected from the trend of previous legislation, and the circumstances of the times, "it was by far the most liberal measure of the kind up to that time enacted by our Government. Two classes of dependent relations heretofore unknown to our legislation—mothers and orphan sisters—were provided for, while the pensions to other classes, and particularly to widows and orphans, and to disabled seamen, were largely increased." The history of Civil War pension legislation is one of continually increasing liberality on the part of Congress. The next development was the Act of 1864, which introduced the new principle of fixed rates for specific disabilities. A table of those rates as amended by subsequent legislation, which vary from 100 dols. per month for loss of both hands to 24 dols. per month for "disability equivalent to the loss of a hand or a foot," is given and well repays examination. As time went on the rates of pensions were increased and extended to fresh classes of dependents. One of the results of all this legislation was the creation of a class of *pension attorneys*, and *claim agents*, whose proceedings were not always commendable. Since then there has been a further demand for pensions, which has resulted in the passing of Arrears Acts, and the Dependent Act, 1890. The former "in substance provided that all pensions which had been granted under the general laws regulating pensions, or which should thereafter be granted, in consequence of death from a cause which originated in the United States service during the Civil War, or in consequence of wounds, etc., should commence from the date of the death or discharge of the person on whose account the pension had been or should thereafter be granted." A table is given showing the extraordinary increase in the number of first payments after the passing of the Arrears Act, and the system is described by the Author as one that "put a premium upon fraud, the method of

adjudication facilitates fraud, and there is no doubt in the mind of the writer that fraud was an element in the establishment of many claims under the Arrears Act." Of a later law he speaks even more strongly. "This law like the original Arrears Act puts a premium on crime." As might be expected, the passage of the Arrears Act resulted in the demand for further legislation. A significant fact to be noted is that the voting strength of the veterans of the Civil War was very great; it was made a political question; "each party attempted to pose as the special friend of the soldier." President Cleveland had the courage to veto the first Dependent Pension Bill, and it is interesting to notice that "Mr. McKinley, of Ohio, was among these who spoke in favour of passing the Bill over the veto," and in 1890 was passed "the most important pension law ever enacted. Up to June 30th, 1897, it had cost the country about 500,000,000 dollars, and over sixty million dollars is being paid out annually. It is a limited service pension bill. In the case of soldiers the requirement is three months' service and a certain degree of permanent disability not the result of vicious habits. Widows' pensions are based upon the above length of service by their husbands and their own dependence upon daily labour for support." The criticism of the author on the Act is severe. "The Act of 1890 seems to the writer a bad law. It is loose in expression, unsound in principle and often absurd in application. It stimulates dishonesty and dependence, fails to discriminate between the deserving and the undeserving and prevents the pension list from being, as it should be, a roll of honour." We strongly recommend all who take an interest in a subject, likely to become very important to ourselves, to study this clear and careful treatise, and particularly the last chapter which contains a criticism of Pension Legislation.

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*Ruling Cases.* Edited by ROBERT CAMPBELL, M.A. Vol. XXIV.  
Search-Warrant—Telegraph. London: Stevens and Sons.  
1901.

The most important heading in the present volume is Ship. This is divided into seven sections, which are as follows:—Essential Character; Property and Management; Master—His Authority and Duties; Contract of Affreightment; General Average; Salvage; Maritime Lien. The longest of these are



"Master—His Authority and Duties" and "General Average." The cases reported are sufficient authorities for most of the rules given; and the notes, English or American, are not generally long, or important, though they are always careful and to the point. There are not many differences to remark upon between the English and American Law; but it is interesting to note that by American Law, Maritime Lien was "broader in its application than it was under the maritime law of England before this was extended by statute." There also seems a difference between the English and American law in respect to the position of part-owners of a vessel. Other important headings are Settled Land Act; Settlement; and Solicitor. We have observed the very rare event in this carefully edited work in the shape of a misprint on page 198. Trinder Atkinson and Co. should read Trinder Anderson and Co.

*The Peace Conference at the Hague.* By FREDERICK W. HOLLS, D.C.L. New York and London: Macmillan and Co. 1900.

We recommend this book to the study of all students of International Law, and of all who care to consider either the prospect of the future limitation of the horrors of war, or the chances of the peaceful settlement of International disputes. It is written by Mr. Holls, the Secretary and Counsel to the American Commission, and a member of the third Committee and the *Comité d'Examen* at the Hague. As might reasonably be expected, the American views, speeches, etc., are given with much greater fullness than those of any other nation; but it is none the less very instructive, and most valuable as giving a full account of all the proceedings of the various Committees and the results. The full text of the Conventions, Resolutions, and Declarations is also given, together with the reports of the American Commission to their Government. Mr. Holls takes an optimistic view of the result of the Conference, and avows his conviction "that the Peace Conference accomplished a great and glorious result, not only in the humanizing of warfare and the Codification of the Laws of War, but above all in the promulgation of the Magna Charta of International Law, the binding together of the civilized Powers in a federation for Justice, and the establishment of a permanent International Court of Arbitration." We trust that he is not too sanguine.

*The Annotated Constitution of the Australian Commonwealth.* By JOHN QUICK, LL.D., and R. R. GARRAN, M.A. London: The Australian Book Company. 1901.

This very important measure of constitutional legislation has not long wanted commentators; and the present substantial volume deals exhaustively with the past, present, and, we may almost say, future of the Australian Colonies. The first part consists of an historical introduction, giving an account, firstly, of Modern Colonisation, more especially by the English, and secondly, of the Federal Movement in Australia. This is most valuable to anybody who really wishes to understand the real history and inwardness of the movement, which has culminated in the establishment of the present Commonwealth, spread as it is over about 50 years. Then comes the Commonwealth of Australia Constitution Act. Then last of all, but by no means least, we find the Commentaries on the Executive covering more than 700 pages, and dealing with every point that can well be suggested with great learning, and a vast number of illustrations from the laws and decisions of other federations, mainly those of the United States and Canada. As an instance of the wealth of notes we may point out that the Preamble alone is followed by nearly 30 pages of notes in small print. We do not find *Fielding v. Thomas* among the cases cited on Parliamentary privileges, although *Barton v. Taylor*, which was distinguished in it, is noticed in some detail.

*Poor Law Statutes.* By JAMES BROOKE LITTLE. London: Shaw and Sons. 1901. Vol. II.

This volume contains a large number of Statutes extending from the Births and Deaths Registration Act, 1837, to the Elementary Education Act, 1876. All these Statutes, or parts of them, for in many cases only part of a Statute is given, are connected with the Poor Law, though some of them rather remotely. It is, however, an error, on the right side if it be one at all, to provide a practitioner with everything he may require to refer to. This is so thoroughly done that large portions of Acts are given, which do not refer to the poor law, in order to make clear one or more sections which do. In these cases, however, the notes refer to the pertinent sections only. There are no Statutes given in this volume quite of the same importance or length as some of those in the first volume, but there are many important

Statutes dealing with poor law questions, such as those much litigated subjects, Settlements and Rates. It also contains the Burial Acts, Vaccination Acts, Education Acts, and Parliamentary Representation Acts. All these Statutes are carefully and accurately annotated. We notice that the misprint "resiant" for resident occurs twice in one page. We think that the Jury Act, 1870, requires some more notes, as the Schedule thereto does not contain all the exceptions that now exist, and section 12 of the same Act should have had a note referring to the Customs Consolidation Act, 1876, section 9, which is contained in this volume.

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*The Engineer or Architect as Arbitrator.* By CHARLES CURRIE GREGORY. London: William Clowes and Sons. 1901. Mr. Gregory has special qualifications for the task he has undertaken, having practised for twenty years as an Engineer, and for nearly the same period as a Barrister, and he has produced a book which is likely to be very useful to both professions, not only for its ostensible purpose as connected with Arbitrations, but as pointing out to both Architects and Barristers what the legal position and duties of the former are under building contracts, etc. We think the book is rather more intended for the use of Architects and Engineers than Barristers, as the Authorities are not very fully cited. There is a great store of valuable information, and the statements so far as we have been able to judge are accurate, but the style is not a very good one. The sentences are frequently of abnormal length and construction, one on page 265 occupying no less than 27 lines.

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*The Burial Act, 1900.* By JAMES BROOK LITTLE. London: Shaw and Sons. 1901. This is intended to act as an Appendix to the Author's *Law of Burial*, and gives the Act of 1900, with notes pointing out what important alterations in the law have been effected, and explaining as far as possible the new Act. It will prove useful to burial authorities, and all who have to consider the gloomy subject to which it relates.

*Shots from a Lawyer's Gun.* By NICHOLAS EVERITT. London: R. A. Everett and Co. 1901. We are unable to find this gentleman's name in the Law List, so assume it is a *nom de plume*, or, if not, he has a very unusual knowledge of law for a layman. Posses-

sing not only a knowledge of law, but also being a sportsman, he has produced a most useful book which we can recommend with confidence to Magistrates, Sportsmen, Landlords, Tenants, and last, but not least, to *Poachers*. They will find all the most important legal questions connected with game and shooting, treated with learning and common-sense. It is, in fact, a book no country house should be without. Many points are discussed which have never been definitely settled, and with very few exceptions the Author's opinions seem to us correct.

*Practical Conveyancing.* By WALTER STRACHAN. London: Stevens and Sons. 1901. This contains ten lectures, given at the instance of the Council of the Bristol Incorporated Law Society. They are intended to be, and certainly are, eminently practical. Mr. Strachan's aim is best described in his own words, "My aim will be to deal with the forms of conveyancing documents; to explain the reason of the clauses which are found in them, at the same time briefly touching on the principles of the law of property which are essential to every-day practice." He is rather severe on the present practice of conveyancing and urges "those who are answerable for the preparation of conveyancing documents to see that they are drafted, or at least settled, by competent persons, and not by untrained clerks or callous youths." Duval, the great conveyancer, would, he thinks, "in these decadent days" find "his labour would mainly consist in the understanding of abstracts, characterized by ignorance and gross carelessness." Some of the points we should like to call attention to are, the observations on the delivery of deeds by corporate bodies, on the alterations in deeds, on the perusal of a Draft drawn by another solicitor, and on Stamps. The observations on Conditions of Sale are also very instructive. The whole is well worth the perusal of all who are concerned with the practical work of conveyancing.

*Interpretation of Deeds.* By W. HASTINGS KELKE, M.A. London: Sweet and Maxwell. 1901. This epitome is an abridgement of Elphinstone, Norton and Clark's well-known *Rules for the Interpretation of Deeds*, and "is intended as a primer of first principles solely for the student."

The rules have been carefully considered, and occasionally altered, in accordance with cases decided since the publication of

*the principal work.* There is a very useful chapter recapitulating the rules. Though, like all epitomes, it requires in places further explanation, it is of undoubted value for the purpose for which it is designed.

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Second Edition. *The Law of Trade-Marks, Trade-Name, and Merchandise Marks.* By D. M. KERLY, M.A., LL.B., and F. G. UNDERHAY, M.A. London: Sweet and Maxwell. 1901.

It is seven years since Mr. Kerly published the first edition of this work, and naturally it has required considerable revision and additions. The most important decisions which have been given in the period referred to belong to two classes. In the first class the *Solio* case which decided that the new clauses of the Act of 1888 allowing the registration of "*inverted words*" and "*words having no reference to the character or quality of the goods*" are alternative and independent, and over-ruled decisions which made almost useless the amendment of the law. It is not easy to say what amount of invention is necessary to satisfy the term, and certainly some of the words accepted at the Patent Office show a very slight exercise of that faculty, but as Mr. Kerly suggests, it does not follow that they would stand the test of litigation if it should arise. The second class of cases, and probably the most important, is that in which words, though unable to be registered owing to their being descriptive, have acquired by use and reputation a secondary distinctive meaning. In this case, although no longer treated as trade-marks proper, even where they are used as such, and not admitted, unless as old marks, to registration under the Acts, they may be practically monopolised for use in connection with a certain class of goods by a particular trader, since their employment by anyone else would be calculated to deceive. The most important and recent illustrations of this are the cases of *Powell v. The Birmingham Vinegar Brewery Co.* and *Reddaway v. Banham*; and the extreme to which this principle is now carried is shown by the recent case of *Cash v. Cash* where a trader was restrained from the honest use of his own name; the case, however, is under appeal. The great difficulty in trade-mark, etc., cases is that although there are well-known principles of law a particular case has to be decided so often simply as a question of fact, and this difficulty has been rather increased than diminished by recent decisions. The

present work goes exhaustively and learnedly through the whole law and practice from the definition of a Trade-Mark, to the Criminal Law of False Marking, with chapters on Trade-Libel and Trade-Secret. Mr. Kerly seems to agree with the opinion of Lord Watson in *Johnston v. Orr-Ewing*, which he quotes. "How can observations of Judges upon other and quite different facts bear upon the present case, in which the only question is what is the result of the evidence?" but the habit of referring to reported cases at the trial of such questions being, as he says, "*interate*," he gives a useful collection of cases on the various points of "Fancy Words not in common use," Invented Words, Contrasted Devices; Contrasted Words; Colourable Imitations, etc. There is a considerable amount of space devoted to the important question of Criminal proceedings under the Merchandise Marks Act, 1887, and there is also an Appendix of over 200 pages containing the Acts, Rules and Forms necessary to be consulted, a summary of Foreign and Colonial Trade Mark Laws, Colonial and Foreign Laws as to Merchandise Marks, and much other valuable information.

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Second Edition. *The Law of Negotiable Securities.* By WILLIAM WILLIS, K.C. London: Stevens and Haynes. 1901.

This book contains six lectures which were delivered by Judge Willis, at the request of the Council of Legal Education, and which have been received with so much favour that a second edition has been called for. We are not surprised that this is so, as the lectures combine in an uncommon degree the not always united qualities of accuracy and readableness. The learned author has retained in the revised version of his lectures all the raciness of his verbal delivery. He knows what are the important points to emphasize, and he hammers away at them, and renders them clear to layman and lawyer alike. For an instance, we may refer to the manner in which he impresses on the reader's attention the important characteristics of *negotiability*, and that the term does not merely mean that an instrument passes by delivery, but also "that anybody who takes it *bona-fide* and for value acquires a perfectly good title." The learned author has in an eminent degree the courage of his convictions, and criticizes the judgments of even the House of Lords. In the present edition Judge Willis adheres to his opinion, that *Crouch v. The Credit Foncier of England* was not over-ruled by

*Goodwin v. Roberts*, in spite of the contrary decision of Mr. Justice Kennedy in the case of the *Bechuanaland Exploration Company v. The London Trading Bank*. Much useful advice is given to students and commercial men, and he concludes with an earnest exhortation to the former to "work, work while it is yet day, and in your lives let there be no mis-spent hours."

As is natural in a Common lawyer, he shows a strong preference for the decisions of juries to those of Equity Judges.

Third Edition. *Joint Stock Companies*. By A. PULBROOK.  
London: Effingham Wilson. 1901.

This "handy book" on the law and practice of Joint-Stock Companies by the author of *Responsibilities of Directors* is handy in every sense of the word, and being intended primarily as a manual for Secretaries and others interested in the practical legal management of the business of a company, Mr. Pulbrook has endeavoured, and we think fully succeeded in doing so, to explain in simple terms all the details necessary for directors and officials to understand in conducting the every-day business of a public company from its formation to its dissolution. When it is borne in mind how voluminous and intricate are the provisions of the numerous Acts dealing with public companies, and that a mere omission to carry out a legislative requirement may render a director, manager, or secretary liable to a penalty of £50 a day, the importance of having a reliable and copiously indexed book of this description at hand to refer to is obvious, and doubtless there will be few company officials who will neglect to arm themselves with a copy. There are many methods by which the provisions of the Companies and Protection Act, 1900, may be avoided, but as Mr. Pulbrook only writes for the guidance of honest men, and not for the information of rogues and swindlers, he contents himself with calling attention to some of these methods "so that the public may be put on their guard." There is sarcasm in the comments of Mr. Pulbrook that reminds us of the caustic wit of Mr. Commissioner Ker, and we regret that want of space prevents us from quoting a few of them, but this parting shot with which he ends the last chapter on practical advice to shareholders should be noted by investors—"... the sooner the public are educated to the fact that prices of

shares on the Stock Exchange are not guided by their intrinsic value but by the law of supply and demand, and that for all practical purposes shares may be regarded as counters for gambling purposes, then the sooner frauds in companies will cease."

Fifth Edition. *Michael and Will on the Law relating to Gas and Water.* By JOHN SHIRESS WILL, K.C. London: Butterworth and Co. 1901.

We are glad to see a new edition of this undoubtedly standard work on Gas and Water. The subject is not only a very important one, but one that increases in importance every year. As Mr. Shiress Will states in his valuable introduction, the increase in the amount of capital embarked in gas undertakings has been very great. The amount of capital of authorised gas undertakings was in 1883 sixty-nine millions, while in 1899 it had risen to 99 millions; and this in spite of the competition of electric lighting. There are considerable alterations in the present work, some important cases have been decided since the date of the last edition, in 1894, and important additions will be found in the form of Statutes. The City of London Gas Act, 1898, has been inserted in full as far as unrepealed. The subject of Metropolis Gas is carefully treated in the introduction, and the recent Statutes dealing with the conversion of stock by the Gas Light and Coke Co. and the South Metropolitan Co. are given in the body of the work. Other new Acts are the Metropolis Water Acts of 1897 and 1899, and some Acts relating to Scotland, such as the Public Health (Scotland) Act 1897 and Burgh Sewage, Drainage, and Water Supply (Scotland) Act 1901. A new and useful feature is the addition to the introduction of four appendices containing "a digest of the precedents relating to the compulsory acquisition by local authorities of the undertakings of gas and water companies during the last twenty years." The appendices deal respectively with non-statutory gas undertakings; statutory gas undertakings; non-statutory water undertakings; and statutory water undertakings. The introduction also contains a useful sketch of the proceedings of the various Commissions and Committees who have sat on the London Water Supply. Other additions we notice are a Model Water Bill, a Model Gas Bill, Local Government Board's Model Form of Regulations for Preventing Waste and Misuse of Water,



and the Notification of the Gas Reforms for the Year 1901. The notes are full and accurate, and the index exhaustive. Electric lighting has not been included in the present edition, a separate treatise on that subject having been recently published, edited by Mr. Shiress Will.

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Sixth Edition. *Brooke's Notary*. By JAMES CRANSTOUN. London: Stevens and Sons. 1901.

Although a Notary Public is not so important an officer in England as in some foreign countries, yet he has many important duties to perform, and Brooke's Notary is the *one* book on the subject. Considerable modifications will be found in the present edition, and the first chapter, which is entirely new, gives an interesting account of the origin and growth of the office of Notary. The word seems originally to have meant a shorthand writer. There is a full account of his functions and powers, and the instruments with which they are mostly concerned. A very valuable part of the work is a complete collection of precedents, and all the statutes relative to the appointment and duties of English Notaries. There is also a short Digest of Cases relating to Notaries. The book must be simply invaluable to Notaries, and would be useful to many business men.

Seventh Edition. *Arnould on the Law of Marine Insurance*. By EDWARD LOUIS DE HART, M.A., LL.B., and RALPH I. SIMEY. London: Stevens and Sons. 1901. 2 vols.

A new edition of this standard work is very welcome; and the present one has several new features. The present editors have endeavoured to adhere as far as possible to the form of the second edition, the last for which Sir Joseph Arnould was responsible, "as regards both arrangement and text." As that edition appeared so long ago as 1857, bringing it up to date has involved great labour on the part of the Editors; though they have very judiciously availed themselves of the labours of the late Mr. David MacLachan, both in compressing Arnould's language, and in contributions to the intermediate editions. For the sake, however, of keeping down the size of the work, they have omitted some of that learned gentleman's disquisitions, such as the one on the origin, meaning and history of the term "average," and his criticism of the decisions in *Stewart's Case* and in *Aitchison v. Lohre*. But in spite of

such curtailments the present edition exceeds the previous ones by 300 pages. One of the most remarkable and valuable features of the work is the pains that have been taken to bring the account of "the actual course of insurance business" up to the present day. To accomplish this, the Editors have consulted many gentlemen "of position and of practical experience," and the results are likely to add considerably to the value of the present edition as a work of reference. There is an entirely new chapter on Subrogation, and constant reference is made to the valuable practical works of Messrs. Loundes, McArthur, and Gow. When occasion arises it is pointed out how points discussed are proposed to be dealt with by the Marine Insurance Bill. The space devoted to Jurisdiction, Procedure, and Evidence has been considerably cut down, but there is a short and useful chapter on the subject. The Appendices, which are not the least useful part of the work, contain Statutes, Marine Insurance Bill, 1899, Specimen Slips, Institute Clauses, Club Policy; York-Antwerp Rules, and Rules of Practice of the Association of Average Adjusters. As for the manner in which the editing is done, we have nothing but praise. The Editors have not contented themselves with merely the addition of cases, but they comment and criticise with learning, ability and courage, and do their best to give an opinion on all doubtful points. For instance, they are of opinion, in spite of the decision of Mathew, J., in *Home Insurance Co. v. Smith*, that an ordinary slip is a policy; although that learned Judge's holding was not expressly over-ruled by the Court of Appeal. Their conclusion after discussing the difficulties which arise on the effect of several insurances on the same subject matter, where policies contain different valuations, is "that it is impossible to lay down any rule which is at the same time defensible on principle and also supported by authority." The Editors consider that the decisions in *Gladstone v. King* and *Stribley v. Imperial Marine Insurance Co.* cannot be supported, and adversely criticise the decision of the Court of Appeal in *Price's Case*, which has had the effect of altering the practice of the trade. The definition of general average given by Lawrence, J., in *Birkley v. Presgrave*, and adopted literally by the Court of Appeal in *Svendesen v. Wallace*, i.e., "a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the preservation of ship and cargo" does not quite commend itself to the Editors, who prefer the following, "a loss consist-

ing in extraordinary sacrifices made or in expenses incurred through extraordinary action taken for the preservation of ship and cargo." They also differ from Lord Bramwell in *Wright v. Marwood*, and the view of Mr. Maclachlan in the 6th edition of this work, in holding that the right to contribution "arises not out of contract, but from the old Rhodian laws, and has thence become incorporated into the laws of England as the law of the ocean." For this view they have the authority of Lord Bowen in *Burton v. English* and A. L. Smith and Vaughan Williams, L.JJ. in *Milburn v. Jamaica Fruit, etc., Co.* As to the cost of discharging cargo in a port of refuge, a preference is expressed for the view of Lord Bowen and Mr. Carver, in opposition to that of Lord Esher and the practice of adjusters. Many other instances might be cited of judicious and intelligent criticism, and it is interesting and instructive to note a number of places where criticism of and dissent from the views of Arnould are expressed and the reason therefor given. Thus the Editors seem to agree with Mr. Arthur Cohen in his questioning the soundness of Arnould's statement that "the borrower on bottomry and respondentia has no insurable interest in the property pledged except in so far as the value of such property exceeds the amount for which it is pledged." They also agree with Maclachlan's definition of *materiality* in relation to representations, in preference to that of Arnould; and prefer the American rule as to whether the fulfilment of an express warranty is in all cases a condition precedent to a claim under a policy. They also agree with Mr. Arthur Cohen's criticism of Arnould's rule "that compliance with a warranty will be dispensed with if it be rendered unlawful by a law enacted since the time of making the policy." On the other hand, they retain and support Arnould's statement, that in order to make a loss recoverable it "ought to be referable, at all events, in the way of remote consequence, to the prior act of barratry, although not necessarily in the way of immediate and direct effect" in spite of the adverse criticism of so great an authority as Lord Blackburn in the case of *Cory v. Burr*. We refer to these instances of agreement or disagreement with their author to show that an independent judgment has been exercised in the editing of the present edition, and that statements have not been merely repeated without examination and consideration. This work was published before the adoption of the Glasgow Marine Insurance Rules of 1901; it

would have been interesting and instructive to have had the learned Editors' views on the changes made or proposed in connection therewith.

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**Eighth Edition.** *Alpe's Law of Stamp Duties.* By ARTHUR B. CANE. London: Jordan and Sons. 1901.

The law of Stamp Duties is important and technical. "It imports nothing of principle or reason, but depends entirely upon the language of the Legislature." The need of an accurate and thoroughly revised work of reference is therefore very apparent; and this has been supplied for some years by the book under notice. Although the last edition appeared as lately as the end of 1899 there have been a number of cases of importance decided since, some of which are specially noticed in the preface. The only addition to the Statute Law is sec. 10 of the Finance Act, 1900. The present volume keeps up the high standard of the previous editions, and what more can be said for it?

**Ninth Edition.** *Principles of the Common Law.* By JOHN INDERMAUR. London: Stevens and Haynes. 1901.

The fact that in something like five-and-twenty years this book has reached its ninth edition, and that the last edition went out of print in a little over three years, speaks volumes for the success of Mr. Indermaur's labours. This success has been well deserved. The arrangement is good, the cases cited well-selected, and the statements of law wonderfully clear and accurate, in spite of the conciseness required by the size of the book. We have tested it in various places, and always with satisfactory results. It seems to contain all that a student would require for his examinations, and to be, besides, a reliable and portable work of reference for the practitioner. We notice that Mr. Indermaur prudently, for the purposes of his work, adopts the decision of Mr. Justice Kennedy in the *Bechuanaland Exploration Company v. London Trading Bank*, and does not follow the example of Judge Willis in his lectures, referred to in another review on p. 117 of this number.

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**Ninth Edition.** *Harris's Principles of the Criminal Law.* By CHARLES L. ATTENBOROUGH. London: Stevens & Haynes. 1901.

The issue of another edition of this well-established work, shows that it keeps in favour as "a fair general view of the exist-

ing Criminal Law." Mr. Attenborough only calls attention to two new Acts of Parliament as requiring special notice. These are the Larceny Act, 1901, and the Youthful Offenders Act, 1901, which bears the unfamiliar title of I. Ed. VII. c. 20; neither of which Acts comes into force till next year. We have not noticed any material alterations. Mr. Attenborough has not yet adopted the excellent plan which, we are glad to say, is getting more and more prevalent, of giving the dates of the cases he cites, and the description of the Assizes is still—as was mentioned in these pages in a notice of the last edition—rather misleading. This however is but a slight blemish on an otherwise good work.

Ninth Edition. *The Book of Church Law.* By the Rev. J. H. BLUNT, D.D. Revised by G. EDWARDES JONES. London: Longmans, Green and Co. 1901.

This legal handbook on the Church and its laws, although not originally compiled by a lawyer, being the production of the editor of the *Annotated Book of Common Prayer* and various other well-known works, Theological and Ecclesiastical, has had the advantage of a revision in an earlier edition by no less an authority on Ecclesiastical law than Sir Walter Phillimore, sometime Chancellor of the Diocese of Lincoln, the corrections after the seventh edition being made by the present editor, Mr. Edwardes Jones. The volume is divided into six books, in which are treated successively the Church and its laws—being a comprehensive survey of the constitutional status of the Church, the law relating thereto and its administration,—the ministrations of the Church, the parochial clergy and lay officers, churches and churchyards, endowments of the parochial clergy, finishing off with a very full appendix, setting out the various Canons and Acts relating to the Church and clergy, together with a table of ecclesiastical fees. This is one of the handiest and most reliable works on Church Law that we know of, and the present edition is sure to maintain its reputation and popularity amongst those who—either priests or laymen—are actively engaged in the work of the Church and the administration of its laws.

Nineteenth Edition. *Williams on Real Property.* By T. CYPRIAN WILLIAMS, LL.B. London: Sweet and Maxwell. 1901.

When a treatise has reached its nineteenth edition and been before the profession for over five and fifty years, it is evident that

it has attained its purpose and given satisfaction to its readers, its publishers, and we hope its Author. Widely known and much read, as it has been, its title still remains a modest one, "Principles of the Law of Real Property, intended as a first book for the use of students in conveyancing." Almost every legal student must have perused it some time or other, and we have little doubt that many practitioners have referred to it, again and again, to refresh their memory of principles. The present edition mainly differs from the last one in its addition of the Land Transfer Act, 1897, and the Lands Charges Act, 1900. The statement and explanation of this last "exceedingly ill-drafted measure" has taken up so much room that some of the late author's appendices have been omitted. Part of the chapter on Free Tenure has been re-written, the Author points out, in the light of Professor Maitland's works. There are also added a couple of precedents. We should like to call the attention of all our readers who are interested in the law of Real Property to the concluding remarks on the present state of that law. They are very severe on the recent legislation, which, in the opinion of the Author, has rendered the law more intricate instead of more simple. He says "those who have now to learn, and those who have to teach the law of Real Property, can best appreciate the pressing need for reform which shall not merely change but really simplify the law."

#### CONTEMPORARY FOREIGN LITERATURE.

*Manuel Pratique des Sociétés Commerciales en Belgique.* By Jules Guillery, Ministre d'État, Ancien Bâtonnier. Brussels, 1899.

*La Nouvelle Loi Anglaise sur les Sociétés.* By Gaston de Leval, Avocat près la Cour d'Appel de Bruxelles. Brussels, 1901.

M. Guillery's treatise is a commentary on the Belgian law of trading companies, as deduced from Title IX. of the Code de Commerce and from certain laws, proclamations, and forms to which legal validity has been given at other times. The forms include what we should call articles of association, which are, *mutatis mutandis*, to be followed in all cases. The work will be very useful to anyone who may have to consult the Belgian law of companies.

Not satisfied with commentaries on their own law, Belgian jurists have taken a bolder flight and consider ours. M. Leval's book is an abstract of the Companies Act, 1900, with short notes added. His knowledge is unimpeachable, and he has mastered the Act completely. He does not, however, cite any cases.

*Etudes de Droit International et de Droit Politique.* By Ernest Nys, Professor at the University of Brussels. Brussels, 1901.

This most prolific of Belgian jurists has collected a second series of essays as a sequel to that published in 1896. Many of them deal with matters of importance to English lawyers. Such are those on sea-power, on George Buchanan, Sir Julius Caesar, and Sir Henry Wotton, and on the Bentham papers in the British Museum. These were acquired by the Museum in 1889, and contain many letters and essays not noticed by Bowring. Professor Nys notices the gradual decay of Bentham's style as his years advanced. Bentham himself admitted this, and attributed it to his writing in dog-French or English-French which Dumont put into real French. Unlike Bentham's later work, Professor Nys' is eminently readable, and it contains a good deal of information not readily accessible elsewhere.

*Traité de la Situation Légale des Etrangers en Belgique.* By Alexandre Halot, Avocat près la Cour d'Appel de Bruxelles. Brussels, 1900.

Apparently a very complete guide for the purpose for which it is written. It offers to the English lawyer many fruitful comparisons with his own system, especially in the matters of extradition, naturalisation, companies, and expulsion of foreigners. The last right by a law of 1841 applies to a foreigner who does not misbehave himself in Belgium but has fought a duel with a Belgian abroad. No doubt the law was due to some circumstances well-known at the time.

*Disegno di Legge Organica e Disciplinare per la Cancelleria e l'Ufficio dei Corsori del Tribunale Commissariale della Repubblica di San Marino.* By Vittorio Trebbi. Città di Castello, 1901.

The learned author, who fills a judicial position in the smallest of Republics, presents a draft administrative code, apparently well designed for the circumstances of a small population of peasants. The dedication is to the Republic, "founded on justice sixteen centuries ago." The introduction contains a good deal of obscure but interesting history, such as is at the disposal of English readers in a work by the late Mr. Theodore Bent, "A Freak of Freedom," written in 1879.

## PERIODICALS.

*Journal du Droit International Privé.* Nos. I-IV., 1901, Paris.

These numbers contain interesting articles on the *projet de loi* on extradition and on *La Vie Judiciaire à New York* by M. Emile Stocquart. This writer lays stress on the advantage of a University education which almost all members of the New York Bar receive. An article on the law and judicial organisation of China is well-timed in view of present events. The Empire seems to have possessed a criminal code from as long ago as 1647. The article, written by Wu Ting Fing, the Chinese ambassador at Washington, is well worth reading.

*Deutsche Juristen-Zeitung.* 1 April—15 June, 1901. Berlin.

In an article on the *Pflichtteil* (*legitima portio*), Professor A. von Tuhr regrets that the Civil Code is not expansive, and that Germany has no praetor to exercise *aequitas*. This is an example of the disadvantage of a code as opposed to the flexible equity administered by English Chancery judges. Dr. Flesch deals with the juristic importance of Björnson's latest drama. Several curious decisions are reported, e.g., that a defendant cannot evade the penalties attaching to the unauthorised use of the title "Arzt" by calling himself "Naturarzt." The numerous advertisements in the *Juristen-Zeitung* point to the fact that there are more qualified jurists in Germany than there are places for them to fill.

*Rivista di Diritto Internazionale.* Jan.—Feb., 1901. Naples.

There is nothing of great importance in this number. Articles on the right of *renvoi* and the position of foreign trading companies in Italy serve as an introduction to decisions of tribunals in Italy and other countries, among which England does not appear. The Review also contains the form of a protest against the continuance of the Boer war *in favore dell'eroico popolo Boero*.

*La Giustizia Penale.* 4 March—3 June, 1901. Rome.

This excellent publication, which appears weekly, may be studied with advantage by everyone interested in criminal law and procedure. The differences between the Italian system and our



own are instructive. For instance, opprobrious language, spoken not during a quarrel but after it is over, constitutes injury, not defamation. In the course of the argument "Blakston" is cited as an authority. In another case it was held that a motive not suggested in the Court of first instance could not be relied on in the Court of Appeal.

JAMES WILLIAMS.

Owing to want of space several reviews of important books have been held over, and will appear in next issue.

Other publications received :—*Protection of Foreign Capital* (Albion Printing Press, Buenos Aires); *Salaman's Trade Marks*; *Where to look for the Law* (Lawyer's Co-operative Publishing Co.), Bar Examination Papers, Nos. 2 and 3 (Kelly Law Book Company.)

The *Law Magazine and Review* receives or exchanges with the following amongst other publications :—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*, *Yale Law Journal*, *New Jersey Law Journal*.

IN MEMORIAM.

Victoria :

QUEEN AND EMPRESS

Born May 24th, 1819; Died January 22nd, 1901.

" Many daughters have done virtuously but thou excellest them all "

" Her children arise up, and call her blessed "

Proverbs xxxi 29 & 28

GOD REST THE QUEEN !

GOD SAVE THE KING !

## THE LAW MAGAZINE AND REVIEW.

NO. CCCXIX.—FEBRUARY, 1901.

### I.—THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT.

THE establishment of the Commonwealth of Australia marks a new epoch in the federation of self-governing States, and also in the development of the resources of the British Empire. The previous federations among English-speaking people—that of the United States of America, and subsequently that of the British Colonies in North America—were both effected under the pressure of necessity. The Colonies of Australia have voluntarily agreed to join together. Their union has been the result of somewhat protracted negotiations, and is embodied in the terms of the Commonwealth of Australia Constitution Act, 1900,<sup>1</sup> which may be regarded as a contract between the different Colonies, to which the British Parliament has given its sanction. As the circumstances which brought about this Act differed from those which conducted to the previous federations already mentioned, so the Act itself differs in some material respects from the Constitution of the United States of America, and from the British North America Act, 1867,<sup>2</sup> which is the Charter of the Dominion of Canada. The leading idea of those who framed the

<sup>1</sup> 63 & 64, Vict., c. 2.    <sup>2</sup> 30 Vict., c. 3.

Constitution of the United States was, it has been said, to balance the powers of the Federal Government against those of the different States; that of the framers of the British North America Act was to form a strong federal government to which the Governments of the different Provinces should be subordinate. If such were really the intentions of those who brought about the earlier federations, experience has shown that they failed to use language effectively to carry them out.

Fifteen years ago a permissive Act was passed by the Imperial Parliament to constitute a Federal Council for Australasia, "for the purpose of dealing with such matters of common Australasian interest, in respect to which united action is desirable, as could be dealt with without unduly interfering with the management of the internal affairs of the several colonies by their respective legislatures,"<sup>1</sup> The Council had legislative authority with respect to certain named matters, either of its own initiation or when they were referred to it by the legislatures of any two or more colonies (s. 15), and it also was empowered to make representations or recommendations to her Majesty with respect to any matters of general Australasian interest, or to the relations of her Majesty's possessions in Australasia with the possessions of foreign powers (s. 29). The colonies affected were not only those on the Continent of Australia, but included Fiji, New Zealand, and Tasmania. This Act was not to come in force in any colony till adopted by its legislature (s. 30), and any colony was at liberty to retire subsequently, if it chose to do so. This Act is now repealed, and its place taken by the wider provisions of the Commonwealth of Australia Constitution Act. New Zealand and Fiji are not included in the remodelled federation, being considered too distant from Australia proper.

<sup>1</sup> 48 & 49 Vic., c. 60.

The Australian Commonwealth starts with the idea that certain named powers and duties only are to be given to the Federal Parliament and the Federal Executive, and that with these exceptions, the constitution of each colony (henceforth to be known as a State), the powers of its Parliament, and the laws hitherto in force, are to remain unaltered (ss. 106—108). A noteworthy point emphasizing this initial difference between the Federation of Canada and that of Australia will be found in the mode of appointing the Governors of the different States. The Governors of all British Colonies are appointed by the Crown, that is, by the British Government. When Canada was federated the British Government gave up the appointment of governors for the different colonies which came into the federation, and merely retained the appointment of a Governor-General for the whole Dominion of Canada, leaving to him, with the advice of the Canadian Ministry, the appointment of lieutenant governors for the different provinces comprised in the Dominion. Australia has not followed this example. There is a Governor-General of Australia, appointed by the Crown, who is to be advised by a Federal Executive Council. But the Governors of the different States are to be in no way dependent on, or controlled by the Federal Parliament or Ministry. They will be appointed, as hitherto, directly by the Government of this Country.

The qualifications for membership and method of election of the Senate and the House of Representatives differ in the Australian Act from those prescribed for Canada, but it seems unnecessary to discuss them here in detail as after all they are matters which are chiefly of local concern. It is, however, noteworthy that the Act contemplates and provides for the electoral franchise not being uniform in the different States, and gives the Federal Parliament no power in that respect.

Its *exclusive* powers are restricted to making laws for the peace, order and good government of the Commonwealth with respect to (1) the seat of government and all places acquired by the Commonwealth for public purposes, (2) matters relating to any department of the public service, the control of which is vested in the Executive Government of the Commonwealth, and (3) any other matters declared by the Constitution to be within the exclusive power of the Parliament (s. 52).

It has further power (s. 51) to make laws for the "Peace, Order, and Good Government" of the Commonwealth with respect to many matters grouped under various headings. But this power is *not* exclusive. Each State may legislate with respect to any of the matters enumerated. But "when the law of any State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall to the extent of the inconsistency be invalid." (s. 109.) So far as they are not inconsistent, but auxiliary to or explanatory of each other, laws of the State and of the Commonwealth dealing with the same subject matter may both be valid and in force at the same time. In Canada, by the British North America Act (s. 92), the Legislature of each Province has exclusive powers to make laws with reference to various enumerated local matters and the Dominion Parliament is empowered to make laws for the "Peace, Order and Good Government of Canada" in reference to all matters not coming within the classes of subjects assigned exclusively to the Provincial legislatures. The matters for which the Dominion Parliament may legislate are set out in the Act (s. 91); and the section concludes with the general proviso "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature . . . . assigned exclusively to the legislatures of the Provinces." Most of these subjects are the same as

those named in the later Australian Act—sometimes they are set forth in identical words. But the initial difference of the ideas on which the two Acts are framed makes it difficult to say what will be exact effect of the use of such words in the Australian Act. During the 33 years which have elapsed since the formation of the Canadian Federation many cases have occurred in which the powers of the Dominion and Provincial legislatures respectively have been called in question, and decisions elucidating the meaning of the Act have been given both by the courts in Canada, and by the British Privy Council. The decisions—at any rate of the latter Court—so far as the language of the Acts should be held to bear the same meaning, will probably be followed in cases which may arise as to the interpretation of the Australian Constitution. It may therefore be of interest to notice some of them.

The Australian Act gives the Federal Parliament power to make laws for the “Peace, Order, and good Government of Australia” with reference to matters classed under thirty-seven different headings, some of which are very comprehensive. Whatever does not come within one or other of them will be *ultra vires*, and must be dealt with by the State Legislature, if at all.

The meaning of the general words “to make laws for the Peace, Order and Good Government” has been discussed on several occasions, with reference to different enactments of the Canadian Parliament. It must, however, always be remembered, that under the Canadian Act, *exclusive* powers to make laws with reference to certain subjects were given to the Provincial Legislature, and *exclusive* powers to make laws with reference to certain other named matters to the Dominion Parliament. In most of the cases which have come before the Courts the question for decision was under which class did the matter in dispute properly fall. Where it could not be contended that the

particular matter was within the jurisdiction of the Provincial legislature, the Dominion Parliament, by virtue of these general words, had power to deal with it.<sup>1</sup> Where, however, the exclusive powers given to the Provincial legislature could be invoked, the question arose whether they did not conflict with, and were not therefore overridden by the exclusive powers of the Federal Parliament, and it became necessary in each case to consider under which headings, if any, of the sections giving these powers to the two legislative bodies, the subject matter could more properly be classed. As the powers given to the Australian Parliament are not usually *exclusive*, but merely *enable* its laws to override those of the different States in cases where they conflict, it will not so often be necessary to determine which Parliament was the proper body to deal with the particular matter. But, it seems, that the effect of these general introductory words which occur in the Australian Act (s. 51) as well, must here be limited by the various sub-headings that follow them, and that a federal law which cannot be brought within one of these sub-headings will be of no validity.

The first and perhaps the most important matter for which the Australian Parliament may legislate is with respect to "Trade and commerce with other countries and among States." The Canadian Act gives the federal Parliament power to legislate for (2) "the regulation of trade and commerce." The meaning is probably very much the same as that which the words of the earlier Act have been construed to mean by the Privy Council.<sup>2</sup> By the words "regulation of trade and commerce," power is given to make regulations relating to general trade and commerce. "They would include political arrangements relating to

<sup>1</sup> *Citizens Insurance Co. v. Parsons* ([1881] 7 App. Cas. 96); *Russell v. The Queen* (7 App. Cas. 836).

<sup>2</sup> *Citizens Insurance Co. v. Parsons* ([1881], 7 App. Cas. 96).

trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion." The power given does not authorise the Federal Parliament "to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a particular Province." The Privy Council consequently decided that the right of a Province to impose statutory conditions in the manner in which insurance business should be conducted was in no way taken away by the power of the Dominion Parliament to legislate with respect to "regulation of trade and commerce." As regards this particular business of insurance, possibly because of this decision, the Australian Act gives the Federal Parliament express power to make laws with respect to Heading xiv. "insurance other than State insurance, also State insurance extending beyond the limits of the State concerned." The meaning given to the general words would, however, be applicable where other matters not thus specifically mentioned had to be considered. In a later case<sup>1</sup> the Board intimated that, though the regulation and government of a trade might involve the imposition of restrictions on its exercise for the purpose of preventing a nuisance or of preserving order, "a marked distinction was to be drawn between the prohibition or prevention of a trade, and the regulation or governance of it, indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated and governed." They consequently held that a bye-law prohibiting a trade from being carried on, could not be justified under the words of an Act authorising bye-laws for regulating and governing it. This decision was soon after approved.<sup>2</sup>

<sup>1</sup> *City of Toronto v. Virgo* (1896, A.C. 88).

<sup>2</sup> *Att. Gen. Toronto v. Att. Gen. Canada* (1896, A.C. 348).



It was for some time a moot question whether these words "for the regulation of trade or commerce" would authorise the Federal Parliament to legislate for the restriction or management of the trade in intoxicating liquors. At first the Canadian Courts thought that these words justified the passing by the Dominion Parliament of a permissive Act enabling the inhabitants of any district which chose to adopt it to prohibit the sale of intoxicating liquors there. And the Privy Council declined expressly to overrule this decision, though supporting it on a different ground, viz., that such legislation came under the general words "for the peace, order, and good government" of Canada.<sup>1</sup> The validity of legislation for the restriction of the sale of liquors came again before the Privy Council in 1883.<sup>2</sup> It was then determined that the previous decision that the Federal Parliament could legislate for the furtherance of temperance in no way limited the power of the Provincial Legislature to authorise police or municipal regulations of a merely local character for the good government of towns. Again, thirteen years later, the Privy Council had to answer various questions as to the validity of a local Act of the Province of Ontario, empowering town councils and other local bodies to pass bye-laws prohibiting altogether the sale of intoxicating liquors.<sup>3</sup> In their judgment, they accepted *Russell v. Reg.*, *supra*, as a decision that the general Canadian Temperance Act was validly passed for the peace and good government of Canada, but declined to say that it was an Act "regulating trade or commerce." These decisions would go far to show that the Australian Parliament has no power to pass restrictive temperance legislation; and that such matters must be dealt with by the different States: but the Act provides specifically

<sup>1</sup> *Russell v. Reg.* ([1882] 7 App. Cas. 820).

<sup>2</sup> *Hodge v. The Queen* (9 App. Cas. 117).

<sup>3</sup> *Att.-Gen. Ontario v. Att.-Gen. Canada* (1896 A.C. 348).

(s. 113) that "all fermented, distilled, or other intoxicating liquids passing into any State or remaining therein, for use, consumption, sale, or storage, shall be subject to the laws of the State," and thus seems to put this question beyond dispute. The power to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State (s. 98). The Federal Parliament "may by any law with respect to trade or commerce, forbid, as to railways, any preference or discrimination by any State or any authority constituted under a State, if such preference or discrimination is undue or unreasonable." (s. 102).

Following "Trade and Commerce" come other headings with reference to which the Parliament is empowered to make laws which require a brief notice. (ii.) "Taxation," (iii.) "Bounties." Though the Federal Parliament can, as we have seen, override the State Legislatures, where the two enactments are inconsistent, this power with reference to taxation does not deprive the different States of the right to raise money by taxation for their own needs.<sup>1</sup> It must be noticed that the collection and control of duties of customs and excise and the control of the payment of bounties are by the Act vested in the central Government (s. 86), that these duties are shortly to be made uniform, and that when they are, the Federal Parliament only is to have power to deal with this class of taxation; and trade, commerce and intercourse between the different States is to become absolutely free (ss. 90-92). A State may not impose any tax on property belonging to the Commonwealth, nor the Commonwealth on property belonging to a State (s. 114).

Certain departments of the public service, *i.e.* (1), customs and excise; (2) posts, telegraphs, and telephones;

<sup>1</sup> *Citizens Ins. Co. of C. in L. v. Parsons* ([1881] 7 App. Cas. 96); *Bank of Toronto v. Lambe* ([1887] 12 App. Cas. 575).

(3) naval and military defence ; (4) light-houses, lightships, beacons and buoys ; and (5) quarantine, are to be transferred to the federal executive Government. Naturally the Federal Parliament has power to make laws with respect to them, and in these matters its powers are exclusive (s. 52). The provisions as to customs and excise have already been noticed under the head of taxation. A State may not without the consent of the Parliament raise or maintain any naval or military force (s. 114), but the Commonwealth is to protect it against invasion, and if asked to do so, against domestic violence (s. 119).

The Canadian Parliament may legislate for "sea coast and inland fisheries," the Australian for (x.) "fisheries beyond territorial limits," which words are taken from the Federal Council Act, 1885, "fisheries in Australasian waters beyond territorial limits." It has been decided that this power of legislating in Canada confers no proprietary rights in relation to fisheries. The rivers themselves and the franchise of fishing remained the property of the Provinces as representing the Crown. Consequently, the Dominion Parliament might properly pass an Act regulating the fisheries, and might require persons to take out and pay for fishing licences, but could not grant exclusive licences to anyone, as that would interfere with the proprietary rights of the Provinces.<sup>1</sup> The Australian fisheries given to the Federal Parliament are probably all in the sea, so questions of ownership are less likely to arise.

Heading (xii.) is "currency coinage and legal tender," and (xiii.) "banking other than State banking, incorporation of banks and the issue of copper money." A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts (s. 115.)

By both the Canadian and the Australian Acts the

<sup>1</sup> *Att. Gen., Canada v. Att. Gen., Ontario*. (1898 A.C. 700).

Federal Parliament is empowered to legislate with reference to "Bankruptcy and Insolvency." These words have been held not to conflict with the power of the Provincial Legislature to pass an Act for the relief of a local benefit society which had got into financial difficulties.<sup>1</sup> In a later case<sup>2</sup> the Privy Council declined to define what is covered by the words "Bankruptcy and Insolvency"; but held that a local Act which provided that an assignment for the general benefit of creditors should take precedence of all judgments and of all executions not completely executed by payment, was not *ultra vires* of the Provincial Legislature. They intimated that if the Dominion Parliament should at any time pass a Bankruptcy Act expressly dealing with this matter; it might override the Provincial Act; but held that, till such legislation should be enacted, the local Act was valid. The ground of this decision was stated in a subsequent case to be that the Provincial law did *not* fall within the class "Bankruptcy and Insolvency" in the sense in which those words were used in the Act.<sup>3</sup> The Australian Courts may of course in the future have to determine the meaning of the phrase and the respective powers of the Federal and State Parliaments over matters affected by their legislation in similar respects.

The headings (xix.) "naturalisation and aliens"), (xxvi.) "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws," (xxvii.) "immigration and emigration," and (xxviii.) "the influx of criminals," give the Federal Parliament power to deal with matters already found to be of considerable importance, and likely in the near future to become even more so. At least one Australian Colony,

<sup>1</sup> *L'Union St. Jacques de Montreal v. Belleisle* (1874 L. R. 6. P. C. 31).

<sup>2</sup> *Att.-Gen. Ontario v. Att.-Gen. Canada* (1894 A. C. 189).

<sup>3</sup> *Att. Gen. Canada v. Att. Gen. Ontario* (1898 A. C. 700).

Victoria, has already legislated with a view to restrict the immigration of Chinese. Such laws passed by State Parliaments will, of course, remain valid until the Federal Parliament passes an Act inconsistent with them. The Victoria Act has come under the consideration of the Privy Council in *Musgrove v. Chin Teeong Toy*.<sup>1</sup> The action was brought in the name of a Chinese immigrant who had been refused permission to land in Melbourne; and the refusal was justified under the provisions of the Victoria Act, which limited the number of Chinese who might be landed from any ship. That the Act was *intra vires* the Colonial Parliament was not disputed, and the Courts held that its words justified the exclusion of the plaintiff. The Privy Council went on, however, to lay down the proposition that an alien has no absolute and unqualified right—apart from treaty—to enter British territory: and that no action can be maintained on his behalf, if his admission is refused. The Australian legislation against the admission of Chinese is not likely to be relaxed at present.

The same question of the importation of Chinese labour has given rise to difficulties in Canada. The Dominion Parliament has exclusive power to legislate on "Naturalisation and Aliens." It has passed laws dealing with these subjects, but so far has not attempted to restrict immigration from any quarter. The Province of British Columbia, being situated on the Pacific coast, is naturally the part where the competition of Chinese labour presses most severely. The Legislature of that Province therefore passed an Act in 1898 to prevent the employment of Chinese or Japanese on any public work carried on with Parliamentary sanction. But this Act was disallowed by the Governor-General, and the matter is therefore one which must still be dealt with by the Federal Government, if dealt with at all. There are no express words in the Canadian Act defining which

<sup>1</sup> (1891, A.C. 272.)

Parliament, Dominion or Provincial, has authority to legislate with respect to immigration.

It is expressly provided (s. 116), "That the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or prohibiting the free exercise of any religion; and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." No powers are given with respect to education, and difficulties which have arisen in Canada under this head will therefore be avoided.

The Canadian Act (s. 108) transferred to the Dominion Government certain specified kinds of public works and property enumerated in a schedule. In Australia, where any department of the public service of a State is transferred to the Commonwealth, all property of the State used exclusively in connection with the department, becomes vested in the Commonwealth (s. 85). These departments are (1) customs and excise; (2) posts, telegraphs, and telephones; (3) naval and military defence, (4) lighthouses, lightships, beacons, and buoys; (5) quarantine (s. 69). It will be apparent that State property used exclusively in connection with these departments must in the main be property purchased or created by means of public funds, and maintained at the public expense. Other public property, including ungranted lands and mines of precious metals vested in the Crown, remain the property of the different States. In Canada, lands, mines, minerals, and royalties belonging in 1867 to the several Provinces were expressly reserved to them (s. 109); the different framing of the Australian Act renders such an express reservation unnecessary. It has been held that lands which escheat to the Crown for want of heirs belong to the Province and not to the Dominion.<sup>1</sup> This case was approved in *St.*

<sup>1</sup> *Att. Gen., Ontario v. Mercer* ([1883], 8 App. Cas. 767).

*Catherine's Milling Co. v. Reg.*<sup>1</sup> where the courts held that the beneficial interest in lands vested in the Crown, subject to a treaty reserving them for the use of the aboriginal Indians, belonged, on the expiration of that treaty to the Province and not to the Dominion, and consequently that a licence to cut timber there, granted by the Dominion Government, was invalid. So, again, in the same year, the Privy Council held that a grant to the Dominion Government of a large tract of land for the purpose of making a railway, did not include the precious metals situated in that land, but that they remained vested in the Crown, and the beneficial interest in them belonged to the Province.<sup>2</sup> The right of the Province to Crown lands and franchises was again declared in 1898 in the case of *Att. Gen. Canada v. Att. Gen. Ontario*, *supra*, where it was declared that the proprietary rights in rivers, lakes, and fisheries belonged to the Province, though the Dominion might be empowered to legislate for their control and management. These rights extend not only to property strictly so-called, but to claims or *choses in action*. Thus a Province or State, as representing the Crown, is entitled to payment of debts due to it in preference to other creditors in the same degree.<sup>3</sup>

The part of the Australian scheme which excited the greatest attention in this Country, and was most discussed when the Bill was passed through Parliament, was that dealing with the Judicature and with appeals to Her Majesty, *i.e.*, to the Judicial Committee of the Privy Council. As finally settled, the provisions differ somewhat from those of the Canadian Act, and it seems well, therefore, to examine them with some care.

The British North American Act vests the appointment of the judges of most of the Provincial Courts in the

<sup>1</sup> [1888] 14 App. Cas. 46).

<sup>2</sup> *Att. Gen. British Columbia v. Att. Gen. Canada* ([1886] 12 App. Cas. 295).

<sup>3</sup> *Maritime Bank of Canada v. New Brunswick* (1892, A.C. 497).

Governor-General (s. 96); and empowers the Parliament of Canada from time to time to provide for the constitution, maintenance, and organisation of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada (s. 101). Pursuant to this provision, the Canadian Parliament passed an Act in 1875 to establish a Supreme Court of Appeal and a Court of Exchequer (the judges of which Courts are the same persons, though their jurisdiction is different). The Act was repealed and amended in 1886 (49 Vic. c. 135). The amending Act is now in force. The Supreme Court has appellate jurisdiction from all final judgments of the highest Courts of final appeal in the different provinces of Canada, and in certain other specified cases, including appeals from the decisions of its own judges sitting in the Court of Exchequer. If the appeal is from a judgment of the Court in the Province of Quebec, it cannot ordinarily be entertained unless the matter in controversy amounts to the sum of £400; in the other Provinces there is no such statutory limit. The judgments of the Supreme Court are declared to be in all cases final and conclusive, "saving any right which Her Majesty may be graciously pleased to exercise by virtue of the Royal prerogative" (s. 71). There is concurrently with the appeal to the Supreme Court a right of appeal direct from the Superior Courts of the different Provinces to the Queen in Council. This right existed in the case of the older Provinces prior to the passing of the British North America Act. It has since been conferred by order in Council on British Columbia, the North West Territories, and Manitoba, when they were incorporated in the Dominion. Those familiar with the work of the Privy Council know that such appeals are not infrequently brought, as appellants or their advisers often prefer to bring their cases before the Privy Council,



rather than before the Canadian Supreme Court. If an appeal is decided by that Court, no further appeal is permissible unless by leave, either of that Court or of the Privy Council itself. Leave to appeal is not easily obtained.

Previously to the enactment of the new constitution, the different Australian Colonies, of course, had their own Courts. These Courts remain with the same jurisdiction, and under the same judges as before. When vacancies occur, the appointment remains in the governments of the different States. The Federal Act provides for the creation of a federal Supreme Court, to be called the High Court of Australia, the judges of which are to be appointed by the Governor-General in Council. Their salaries and number are to be fixed by the Parliament. The jurisdiction of the High Court is two-fold (a) original, to determine questions for which Parliament may constitute it a Court of first instance, either alone or concurrently with any other Court or Courts, and (b), appellate.

The original matters are those (1) arising under any treaty, (2) affecting representatives of other countries, (3) in which the Commonwealth is a party, (4) between States or residents in different States, (5) in which a mandamus prohibition is sought against an officer of the Commonwealth (s. 75). The Parliament may also invest it with original jurisdiction in any matter (1) involving the interpretation of the Constitution, (2) arising under any laws made by the Parliament, (3) of admiralty and maritime jurisdiction, (4) relating to the same subject matter claimed under the laws of different States (s. 76). The powers under these two sections may be granted also to State Courts concurrently with the High Court. Its appellate jurisdiction is to hear and determine appeals from any Justice or Court exercising federal jurisdiction, and from the Supreme Court of any State or any other State Court from which an appeal previously lay to the

Queen in Council (s. 73). It may be remembered that the Bill, as originally presented to the British Parliament, proposed to do away altogether with appeals from the High Court to the Queen in Council, and that this proposal was strongly objected to in this Country. The section dealing with this point was consequently redrafted, and now prohibits such further appeals only on questions as to the limits *inter se* of the constitutional powers of the Commonwealth, and any State or States, or of any two or more States. In cases where such questions arise, the decision of the High Court is to be absolutely final, unless that Court certifies that the question is one which ought to be determined by Her Majesty in Council. In other cases the right of Her Majesty, by Her royal prerogative, to grant special leave to appeal to the Privy Council remains. But the Australian Parliament may hereafter, but only with the express consent of the Crown, make laws limiting the matters in which such leave may be asked. Unless and until such laws receive the Royal assent the right of appeal to the Privy Council will not practically be much curtailed.

With reference to these limitations on the right of appeal, there are several points worthy of notice. The appeal from the Courts of the several States to the Australian High Court is not exclusive. The right of appeal from those Courts direct to the Privy Council, which was originally given by virtue of the Australian Courts Act, 1828,<sup>1</sup> and has been continued and extended by subsequent charters and legislation, still exists, as in Canada. As there, where the losing party appeals to the High Court, neither party is entitled as of right to any further appeal; but the right of the Crown, in virtue of the royal prerogative, to grant leave for a further appeal in cases where the Privy Council deem it right to do so remains, except where taken away by

<sup>1</sup> 9, Geo. IV., c. 83, s. 16.

express statutory enactment. In the British North American Act there was no limitation put on the power of the Crown to grant such leave ; while in the Australian Act all questions as to the construction of the constitution are excepted. On the other hand, no express restriction was placed on the power of the Canadian Legislatures to frame laws so as to limit or prohibit this right of the Crown to grant leave to appeal ; but the Australian Act provides that "proposed laws containing any such limitation shall be reserved for Her Majesty's pleasure," the effect of which is that no such measure can become law, unless approved by the Secretary of State, whose duty it is to advise the Crown in such matters. The Canadian Parliaments have, in at least two instances, legislated in such a manner as to prohibit appeals, and the effect of such legislation has come under review by the Privy Council. In 1872 and 1875 the Quebec Parliament passed Acts transferring the trial of election petitions to the judges, and by the latter provided that "the judgment of the superior court in such cases shall not be susceptible of appeal." A candidate who had been unseated on petition by the Quebec Court, applied to the Privy Council for special leave to appeal. But the leave was refused, on the ground that by these Acts special powers were delegated to the Court, which was substituted for and exercised the powers of the legislative assembly, and in view of the peculiar nature of the enactments there was no prerogative right to admit an appeal, therefore the leave asked for must be refused.<sup>1</sup> In another case, the Parliament of Canada having passed an Insolvency Act which limited the right of Appeal, and declared that the judgment of the Court to which the appeal could under it be made should be final, the Privy Council held that, as the Canadian Statute contained no words derogatory from

the prerogative of the Queen to allow appeals in matters of insolvency as an act of grace, leave should be granted.<sup>1</sup> There are analogous instances in the legislation of this Country, by which the common law right or privilege of the subject to appeal to the Crown is taken away altogether or limited. In all these cases the restriction is by express words in an Act of Parliament, to which the consent of the Crown has been given. So it must be in Australia, and the right of Appeal is not likely to be given up, except in cases where, for some good reason, prompt decision of the dispute seems so important as to render the possibility of mistakes by the local courts preferable to repeated appeals.

The above *résumé* of the points of the Australian Act which seems most important—viewed from a constitutional standpoint—is as exhaustive as the limits of space permit. Other federations of British Colonies may possibly be proposed in the near future. Both on that account, and from the interest which naturally attaches to an event so important, the progress of the new Commonwealth of Australia will be carefully watched by all who study the making of history. Whether the Canadian or the Australian Act is the better suited to the needs of countries, which form part of the British Empire, time alone can show.

J. V. VESEY FITZGERALD.

<sup>1</sup> *Cushing v. Dupuy* ([1880] 5 App. Cas. 409).

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## II.—THE ROMILLY SOCIETY: ITS OBJECTS AND ITS WORK.

ENGLISH lawyers are open to the imputation that they attach themselves to the concrete, neglect the abstract, care little for principle, and thus avoid the distraction, and perhaps hindrance to personal advancement, which anxious thought upon wider matters than mere technical law necessitates. The ordinary early career of the lawyer is spent in applying himself to, and charging his mind and memory with formulæ, maxims, and cases. The process tends to narrow his sympathies, and endanger his originality. His personal success becomes, in most cases, the all-pervading care of his life, and faithfully does he bow down to and fulfil the maxim, that the law is a jealous mistress and demands exclusive attention.

We are not pretending to dictate what a lawyer's feelings should be, but only, we hope, with the assent of our readers, noting, and, perhaps, deploring the fact. Along with the acquisition of technical knowledge, or soon after it is attained, comes the period when the practitioner is engrossed in and studies the art of advocacy, such as small causes dictate, not by any means a sphere in which the practice of the higher principles, or even morals, would be found profitable in the worldly sense. From this enervating influence a few emerge, but many are left unaware of its corrupting effect: Higher aims, a loftier sense of public duty, an anxious care for the reputation of his order, should present themselves, and demand less selfish absorption. The object of existing legislation, its merits, or injurious effects, the necessity for its amendment: the limits of new legislation, to be ascertained by discussion of its tendency, are all, surely, attractive subjects for the employment of our reason. Something must be dared, some sacrifice be made, to attain to legislative or legal

improvement, though selfish interests conflict. At this stage, conscience prompts thought and a wider sense of duty. Fees may tempt, employment may engross, but the small voice, hard to silence, may and should urge to a wider range and sense of duty. Some follow the political temptation—the road to distinction through adherence to party discipline. Independence is stifled, the fear of being stamped as a pursuer of “fads” represses the sense of duty. The novice takes safety for his guide, and keeps under, his better instincts. He will not seek to originate or to reform existing abuses, as he may have been at first prompted to do. It might be inconvenient to be consistent—to be original. He views such efforts from a standpoint of his own above them, occasionally striking in, to aid when questions have become so popular as to enable probable credit to be acquired. He is a mercenary for what will pay him well.

If what we have said be as we think it, a true analysis of motives and temptations which beset lawyers, because they are men, we cannot be surprised that so few, possessing qualifications as great as we know many lawyers to be endowed with, come to the front to claim the earnest admiration of their fellow-citizens for public spirit.

In the ordinary run of professional life we find men immersed in the petty strife of everyday actions in the Civil courts, the tricks of advocacy, witnessing the success of the wrong over the right, without repining—even with exultation on account of personal success. It is not an ennobling school, it must be admitted.

We see, too, in the courts of criminal procedure—the Sessions, the Assizes, the Old Bailey, the same springs and motives at work. Justice is not the practitioner's care ; the laws working ill receive no criticism from him : the guilt or innocence of the condemned gives him no anxiety, or only a discomfort soon shaken off. If his conscience be

sometimes stirred as to what *ought* to have been the verdict, he salves it with the comforting reflection that he is only an instrument in the hands of Providence. Stern and revolting and unwise sentences may momentarily shock him, but he restrains his criticism, and perhaps even applauds the judge, upon whom he lays the responsibility. Such are the material agents to secure Justice in this country. Such advocates are always content to be schooled in the grooves of Time without change, and deem them right because they have found them in existence. We are proud of our profession: we hope our criticism will be deemed justified by many, and though it may throw a passing shadow over its reputation, our only desire is that we may make it nobler. What can be done to reform and elevate? We, thus expressing ourselves, are conscious of our own small powers, and of some of the failings we have sought to recognise as amendable. Yet would we invite *all* to the work which we have in hand, for we are sure that a little explanation of our hopes and aims will attract.

The Criminal Law has remained but little changed in severity—its sentences, its jargon, and the helplessness of the accused are where Romilly, Macintosh, Lord John Russell, and Sir Robert Peel left it, purged only of some of its more sanguinary features. The poor criminal, as Mr. Justice Mathew said, “has no friends.” It is true that Commissioners have sat and made reports, but their efforts have been neglected, and are almost forgotten. The criminal has always been treated as neither of our own flesh nor blood. Judges, Recorders, Chairmen of Sessions, have set themselves to convict: then turned to the statutes to see how much punishment they could give, and have given it according to their own peculiar estimate of the crime, always with the idea that by violence they could repress violence, by severe sentence they could deter from crime.

Trumpery thefts have been accumulated as "previous convictions," and the stealing of a handkerchief, a barrow, a garden tool, have been punished with ten to fourteen years' penal servitude !

A change has come over this senseless practice. A better feeling now pervades the judicial mind. It has been proved by experience recently, that sentences may be safely, and have been, reduced by 30 per cent. of their length, and we insist may still be further moderated. Along with all this the rigours of the gaol : penal servitude : insufficient food—all fearful instruments of severity, have been by recent Rules modified and improved, although insufficiently.

Whilst craving pardon for this prelude, which is meant to set forth the reasons for founding the Romilly Society, we proceed to insist upon the necessity for its existence. The clumsy distortion of the definition of felony to be found in the Law of Constructive Murder: the denial of the effect of provocation by words, in cases of murder, which may move human anger to the utmost depths, and master the self-control of the most forbearing : the extraordinary assumption of the Secretary of State in cases of doubt, in which, as in Lieutenant Wark's and other instances he has constituted himself a court for passing a substituted sentence, founded upon his view of the immorality of the accused, and disregarding doubts as to the correctness of the conviction, are all instances calling for correction. We could multiply these, which the thoughtful are continually called upon to consider, but we will reserve others for the more methodical statement of the aim and objects of the Society with which this article concludes, in order that we may say something of those who have devoted themselves to the foundation of the Romilly Society. The writer of this article, whose judicial action during the past fourteen years has encountered some adverse criticism is responsible for the appeal to his brethren. He



appealed in May, 1898, to a number of the Judges and his legal contemporaries to join in forming a Society, the objects of which we have already briefly sketched in part, the prospectus of which will more fully show what is needed. Among the Judges he found the late Lord Chief Justice, Lord Russell of Killowen; Lord Justice Roland Vaughan-Williams; Lord Brampton; Mr. Justice Mathew and Mr. Justice Wright, early and hearty sympathisers. Lord James of Hereford, the able advocate when Attorney-General, of the establishment of a Court of Appeal for criminal cases, was among the first supporters of the proposal, and he has since, with the generous kindness of his nature, personally assisted its deliberations. Members of Parliament: philanthropic and large-minded men and women enrolled themselves in the ranks of the new Society. The special knowledge of the Rev. Douglas Morrison, formerly chaplain of Wandsworth Gaol, who proved himself so useful and powerful in improving the recent Statute for the regulation of Gaols: the life-long advocacy of mercy by Mr. Robert Johnson, especially to poor girls charged with infanticide, of whose sufferings he so powerfully wrote in the pamphlet, "I was in prison," entitle these gentlemen to special mention among the many who are labouring with us.

Surely we may assert that here is a duty clearly outlined before us in which a little attention, a little labour, a little expenditure of money (we ask but little), may be potent to effect reform and obtain better treatment for the much-neglected convicts and occupants of our prisons. Humanity demands it, and our best public interests require it at our hands. Some very useful work has been already effected by the Society. Opposition to proposals in Parliament for the further extension of flogging, watchful care in opposing the tendency of the private member of Parliament to legislate for the creation of new offences, and successful progress in the Reform of Prisons may be counted among its services.

The name of Sir Samuel Romilly was adopted in the title of the Society because to him belongs the merit of being the most distinguished and the earliest of those who advocated a more merciful Criminal law than that which previously existed. He found the law written in blood. With courage and perseverance he attacked and exposed its cruel and baneful operation. He was met with ridicule by the shallow and unthinking, and with powerful opposition by many who were unable to emancipate their reason from doubting fears of the results, which change of long established practice might produce.

The work so worthily begun has been carried on by others proud to emulate and succeed him, but much remains to be done. Reform of the kind under consideration has, alas! little attraction for the mass of mankind, though doubtless there are many who wish success to the endeavour. The criminal is regarded as *vermin* by many, and deserving of no better treatment than he receives, even meriting persecution rather than prosecution. Philosophically, proposals for his extinction are even discussed. Some thinkers, it is true, to their credit, be it said, have sought to discover means for his reformation, but their labours have resulted in the advocacy of greater severity as the main remedy.

Occasionally the mind of the public is startled by disclosures of drastic official action in their supposed interest, which they denounce and refuse to sanction. But soon it is easy to bring these luke-warm humanitarians round to acquiescence or indifference by artful stress being laid upon the necessity of ensuring the *safety* of the community. Thus there ensue heats and chills in the public sympathies towards offenders.

One great object to be kept in view by the friends of the Society should be its maintenance as a powerful means of calm investigation and amendment. The Society in no respect disregard public security, nor would it aim at

pampering or unduly favouring the convict, but it confidently hopes to prove in the end, that the public safety is best secured by wise, considerate, and humane treatment of the criminal, and the judicious amendment of every law which conflicts with this view.

Some of the reforms which the Society advocates deserve special mention.

In the front rank is placed the necessity for the appointment of a Minister of Justice charged with the duty of supervising the administration of the Criminal law in all particulars, of giving advice to the Crown in the exercise of the Royal Prerogative, in the revision of sentences in all courts whether under indictment or summary procedure, including orders of Magistrates.

It is generally but erroneously supposed that the Secretary of State for the Home Department at present performs these duties. He does what he is able to do, under a vast burden of Ministerial work, aided by the Permanent Under-Secretary and a clerk in the Department, in cases brought specially to his notice. But these form a small proportion of the whole. The action is necessarily timid, imperfect, and official. It has been often argued that it is desirable to substitute for this Minister—jaded, overworked, and charged with an infinite number of various duties, political and administrative—another with undistracted mind empowered to deal with a mass, it is true, of difficult problems, but at all events alike in principle, requiring similar knowledge, and governed by similar maxims. Such a Minister would be empowered and therefore bound to exercise his independent judgment.

The institution of a Court of Appeal in criminal cases is the next most urgent reform. The Judges themselves several years since suggested that one should be created. Its chief function would be the revision of sentences, and to re-try at the request of the Secretary of State such

cases as he might refer to them for further argument and consideration in public.

Then comes Reform of the system of penal servitude. Of this punishment the initial stage is *nine months*<sup>1</sup> *solitary imprisonment*, a most fearful and injurious infliction. Of the whole course of penal servitude, competent observers pronounce that it is degrading to the mind and the senses, fraught with the effects of horrible companionship and so hopeless, so like to slavery, as to destroy every remnant of good feeling, moral fibre and strength of will of the wretched convict, who when at last he is released is returned upon the tide of life, a wreck, to be carried hither or thither, where stronger rascality and ruffianism may force or lead him.

Reform of prison regulations especially those relating to the treatment of untried prisoners next demands attention. At present this treatment cannot be reconciled with the maxim of law which presumes them to be innocent. The degrading and indecent personal examination—the dietary scale<sup>2</sup> scientifically contrived in weighed and measured quantity to suit the average of large and small, strong and weak, delicate and coarse, or large and small feeder, without care for the suffering of the extremes,—the torture of the plank bed,<sup>3</sup>—the absence of amusements or recreation,—the Regulations that restrict the receipt of letters for a long period after conviction, and when permitted only occasionally, at long intervals, the privilege is liable to forfeiture for trifling offences,

<sup>1</sup> Reduced to six months by Rules under the Stat. 61 & 62, Vict. c. 41, still a fearful and unjustifiable infliction.

<sup>2</sup> Now after 20 years have passed during which the scale has been denounced by the writer and others and defended by officials, it has been declared insufficient in quantity and quality, but timidly improved only to a meagre extent.

<sup>3</sup> Almost abolished—why not entirely? “Every male person over 16 and under 60 years of age sentenced to hard labour shall be required to sleep without a mattress for the first 14 days, unless the medical officer shall order otherwise.”

perhaps inadvertently committed, for a sulky look at an insulting warder or a hasty expression wrung out by provocation—the punishment of bread and water and confinement to the cells for slight offences, inflicted with tyrannical readiness, and flogging with the cat-o'-nine-tails. These latter inflictions are shown to be arbitrary, and in part unnecessary, by the excessive number of instances in one prison compared with another.

Prison Visitors to be encouraged and their duties and powers enlarged.

The Moderation of sentences of unnecessary severity.

The Question of Capital punishments.

The amendment of the law of “Constructive” Murder.

The amendment of the law of Murder in respect of provocation.

The amendment of the law in respect of Infanticide.

The abolition of sentences of flogging.

To secure the granting of bail.

Provision for the defence of accused persons.

To secure the release and compensation of the innocent convicted, and wrongly accused, and to procure the reconsideration of doubtful convictions, or excessive punishments.

The foregoing are set forth as specimens of the work which the Society is carrying out, but they must not be taken to limit its action in any cognate matters it may choose to entertain.

In conclusion, the Society confidently appeals to the Profession outside and to the world to support its endeavours.

CHAS. H. HOPWOOD.

<sup>1</sup> Can now only be inflicted after special reference to the Secretary of State and his confirmation obtained. This is our greatest success. It is not regulated by Rules, but by express words in the Statute 61 & 62 Vict. c. 41, s. 5. Some other useful reforms have been embodied in the Rules of 1898 which have become law.

## III.—SPECULUM AND MIRROR.

THE word *Speculum*, and corresponding words in ancient and modern languages, such as—to take only the less obvious ones—Hebrew,<sup>1</sup> Arabic,<sup>2</sup> Greek,<sup>3</sup> and Icelandic,<sup>4</sup> have been used for many centuries to denote handbooks on different subjects. In this sense *Speculum* is comparatively late in origin, but its connexion with the literal mirror is obvious. A line of Terence,

*Inspicere tanquam in speculum in vitas omnium,*<sup>5</sup>

may supply the link. The word means a book in which certain statements or pictures (for many of the more popular *Specula* were illustrated) appear as in a mirror. In one case (that of Durandus, mentioned later) the book was also called *Speculatio*. This term, however, is more properly derived from *specula* than from *speculum*. *Specula*, *speculor* and *speculatio*<sup>6</sup> generally imply an attempt by research, *speculum* having no such meaning, but being confined to what is the result of research. The reason of the employment of such a word as *speculum* seems to be the ineradicable tendency to metaphor in writing, illustrated by the analogous cases of the numerous Anthologies, Ladders, Labyrinths, Garlands, etc.

In classical literature there are none but faint foreshadow-

<sup>1</sup>One of the most interesting examples is *Barnet-Spiegel, Speculum Clarum*, a German book in Hebrew characters, published at Bâle in 1602.

<sup>2</sup>Such as *Speculum Mundum representans, interprete Abrahamo Eschellensi* (Paris, 1641).

<sup>3</sup>There are at least two *Catoptra*, that of Petrus Aureavallis, also called *Rationalis sive Speculum Ecclesiæ*, and Fludd's καθολικόν medicorum κάτοπτρον (Frankfort, 1631).

<sup>4</sup>S. Lyche, *Einn lytill Iðruna Sprgill*, translated by Olaf Gislason (Hólar in Iceland, 1775), a volume of sacred verse. Also the *Speculum Regale* (see below).

<sup>5</sup>Adelphi, iii., 3, 61.

<sup>6</sup>Augustine, *De Speculo*, defines *Speculatio* as *longe videre*. This would perhaps hardly be recognised as true in the Throgmorton Street of to-day.

ings of the future metaphorical use. One has already been given, another occurs in the same play :

*Pueri in quibus ut in speculo natura cernitur.*<sup>1</sup>

Somewhat similar uses occur in Lucretius :

*Hoc igitur speculum nobis natura futuri*

*Temporis exponit post nostram denique mortem,*<sup>2</sup>

and in Cicero, whose use of *speculum naturæ*<sup>3</sup> may be compared with the phrases just quoted. In the Corpus Juris only the literal use is found. One of the meanings given by Du Cange is *registrum* or *registum* or *series cartarum*. The use of the word by Dante is interesting. In Par. ix. 61, he says :

*Su sono specchi, voi dicete troni,*

*Onde rifulge a noi Dio guidicante,*

a kind of forerunner of the later connexion between justice and the mirror. Compare Par. xiii., 59, perhaps suggested by St. Thomas Aquinas' suggestion that the Word is the *speculum* of God. Dante's arrangement of sins in the Purgatorio was probably derived from St. Bonaventura's *Speculum Beatæ Virginis*. In the eighth epistle (to the Italian Cardinals) Dante says, *Nescio quod speculum, Innocentium, et Ostiensem declamant*. This is an allusion to the *Speculum Juris* of Gulielmus Durandus or Durante (d. 1296) Bishop of Mende;<sup>4</sup> the others named in the sentence being probably the *Compilatio Tertia* of Innocent III., and the glosses on Canon Law by Enrico da Susa, Cardinal of Ostia.

Four great classes of *Specula* may be distinguished, theological, philosophical, legal, and general, including satirical, of which many examples exist. Theology seems to lead the way ; the oldest work of the kind—as far as the

<sup>1</sup> iii. 4, 51.

<sup>2</sup> iii., 987.

<sup>3</sup> *De Finibus*, ii., 10, 32.

<sup>4</sup> Whence Durandus was sometimes known as *Speculator*, a use of the term etymologically wrong.

writer's researches have extended—is the *De Speculo* of St. Augustine.<sup>1</sup> The point of the work is that the mind of man is the *speculum* of the Trinity, and on it the Beatific Vision may be impressed. The theological *speculum* came down as a commonplace through many centuries, in fact, up to a few years ago.<sup>2</sup> Among books of this kind the first place is taken by the famous *Speculum Humanæ Salvationis*,<sup>3</sup> the production of which in large quantities taxed to the utmost the resources of the xylographic art just before the invention of printing. Others of the more prominent *specula* of this kind were the encyclopædiac *Majus Speculum* of Vincent of Beauvais, the *Speculum Perfectionis* of Brother Leo the Franciscan,<sup>4</sup> the *Speculum Spiritualium* of Richard Rolle of Hampole, the *Specchio da Croce* of Domenico Cavalco, and the *Miroir de l'Âme Pêcheresse*, attributed to Margaret of Navarre, and translated by Queen Elizabeth as “The Mirror of the Sinful Soul.” This list comprises only a small selection of the vast mass of theological *specula*. Among philosophical and general may be classed two or three of the more notable. The perennial *Speculum Noctuæ* or *Eulenspiegel* is known to everyone, at any rate by name. History is represented by the *Speculum Historiale* of Richard of Cirencester, science, true or false, by the three *Specula* of Roger Bacon, *Alchimia*, *Secretorum*, and *Mathematica*, and the *Speculum Astrologia* of Albertus Magnus. Considerably later social matters are dealt with in Gascoigne's “Steel Glass.” There are several anonymous Spanish *Espejos*, such as *de Caballerias* and *de Principes y Caballeros*, somewhat in the Castiglione style.

<sup>1</sup> Itself possibly based on the *ἑσπεριον* of the Book of Wisdom.

<sup>2</sup> e.g., Canon Newbolt's *Speculum Sacerdotum* (1894).

<sup>3</sup> This work has often been edited and described, e.g., by Berjeau, *Essai Bibliographique sur le Speculum Humanæ Salvationis* (Paris, 1862).

<sup>4</sup> Recently edited by P. Sabatier (Paris, 1898), and translated by S. Evans as “The Brother Minors' Mirror of Perfection.”



Sometimes the writers throw their ideas into verse, as in the *Idruna Spegill*, the *Speculum Regum*, the prologue to the *Sachsenspiegel*, and the "Myrroure for Magistrates." The strangest of all the satirical ones is surely a production of the seventeenth century, *Speculum juvenum uxores impetuose affectantium, in quo plurimos feminarum viperinos mores ex omni pene genere conditorum selectos solc clarius deprehendunt*.<sup>1</sup> In the long title of Sebastian Brant's *Stultifera Navis* the word *speculum* is used. This was no doubt introduced as an attractive phrase, likely to be found taking in a popular work.<sup>2</sup> The vogue of similar works is also shown by the fact that the "Myrroure of the World" was printed by Caxton and the "Myrroure of the Church" by Wynkyn de Worde, both translations.<sup>3</sup>

In the days when the practice of the law was largely in the hands of ecclesiastics, the transition from theology or philosophy to law was easy, and a popular title was also to be desired. The fact that Augustine and Aquinas had used the word would be sufficient to consecrate it, and both lawyers and laymen were accustomed to both the idea and the phrase. It is impossible to arrange the legal *specula* quite in order of date, but perhaps the *Speculum Juris Canonici* of Petrus Blesensis or Peter of Blois (d. 1200),

<sup>1</sup> The tendency of early legal writers to make use of verse in order to convey their meaning has often been noticed. Something on the matter will be found in the *LAW MAGAZINE AND REVIEW*, vol. xxii., p. 224. As far as regards the *Sachsenspiegel*, the words of its latest editor, Dr. Julius Weiske, are as follows:—*Recht und Poesie stehen in inniger Verbindung; Poesie ist im Rechte und die Rechtsausdrücke werden von den Dichtern mit Vorliebe verwendet*; (preface to 7th Ed., Leipsic, 1895).

<sup>2</sup> Anon: Paris, 1647.

<sup>3</sup> It is not without interest to note that when Gutenberg and his partners were printing at Strassburg in 1438, they made it known, in order to divert suspicion, that they were making mirrors by a new process. Was this possibly a play on words, with a veiled allusion to literary mirrors?

The first of the *Speculum Mundi*, the second of Hugh of St. Victor's *Speculum Ecclesie*.

a famous book with the Canonists, has the right to the first place. The thirteenth century produced several, the best known being no doubt those primitive manuals of "Kaiserrecht"<sup>1</sup> the *Sachsenspiegel* or *Speculum Saxonicum* compiled by Eike von Repgow about 1230, and the *Schwabenspiegel* or *Speculum Suevicum*, also called *Lant-rehtbuoch* (no doubt founded on its Saxon predecessor), compiled by an anonymous editor about 1278. Both have been edited many times, and are among the most valuable monuments of the early German law.<sup>2</sup> On the same lines is the *Spiegel der Deutschen Leute*.<sup>3</sup> To about 1240 belongs the *Speculum Regale*,<sup>4</sup> known in the vernacular as *Könungs-Skuggsjá* or *Kongs-Skuggsio*, chiefly a description of Iceland and Greenland and the Northern Seas. This, like the German *specula*, has gone through numerous editions,<sup>5</sup> and may be considered a law book by virtue of the appendix annexed to it. This is a treatise on the relations of Church and State in Norway, and contains numerous citations from the *Corpus Juris Canonici*. From the South of Europe come the *Speculum Juris* of Durandus (already mentioned), and the *Especulo o Espejo de Todos los Derechos* of Alfonso el Sabio. To the fourteenth century belongs the *Speculum de Tregua et Pace* of Joannes Andre (died. 1348), the framer of the statutes of Bologna University and the defender of the legality of the election of Boniface VIII. In the same century was written the first and last English

<sup>1</sup> Mr. Jenks alludes to the legends which grew up later, by which the authorship of these *specula* was attributed to kings and emperors. (*Law and Politics in the Middle Ages*, p. 48).

<sup>2</sup> There is an edition of the *Sachsenspiegel* dated as early as 1484, published at Augsburg by Theodoric von Bocksdorf, Bishop of Nuremberg. It was glossed during the same century by Nicholas Wurin.

<sup>3</sup> Not printed until 1857.

<sup>4</sup> Not to be confounded with the *Speculum Regum* of Godfrey of Viterbo, or the *Speculum Regale*, the work of one Williams, who prophesied in it the death of James I. in 1625, and suffered for treason.

<sup>5</sup> The best seems to be that of Christiania, 1848.

mirror of a strictly legal nature. The "Mirror of Justices," though stated by Plowden<sup>1</sup> to have been written before the Conquest, was undoubtedly the work of Andrew Horne or Horn, who died in 1328. Whether it was compiled during this or the previous century seems quite uncertain. It was first published in 1642 as *Miroir des Justices vel Speculum Justitiarorum*, and translated into English by William Hughes four years afterwards. The work is exceedingly inaccurate in its law, and probably was, as Professor Maitland suggests, professionally a failure. This would account for the delay in publishing a manuscript which must have been known long before 1642. Of a similar title, but in other respects very different, was the "Myrroure for Magistrates," chiefly known by the "Induction" written by Thomas Sackville, Earl of Dorset, about 1557. The main body of the work, like the "Induction" in somewhat halting verse, was completed by Baldwin and Ferrers, and published in 1559 and 1563. It is rather a moral than a legal work, but has incidental legal references. In 1584 appeared "A Mirour for Magistrates of Cyties," by that dull and voluminous writer, George Whetstone. It was, no doubt, suggested by the previous work. To the same century belong *Der Richterlich Clagspiegel* of Sebastian Brant,<sup>2</sup> and *Der Layenspiegel* of Ulrich Tengler. The first is a treatise on procedure, the second deals more particularly with torture as applied in the Suabian Courts. From Spain came Pedro Belluga, *Speculum Principum ac Justitie*<sup>3</sup> in the sixteenth century, and in the seventeenth Gabriel Berart,

<sup>1</sup> Comm., 8.

<sup>2</sup> The latest edition is the one edited for the Selden Society by Mr. W. J. Whittaker (1895). He puts the date at 1285 to 1290, but there is not much evidence.

<sup>3</sup> Strassburg, 1542. <sup>4</sup> *ib.*, 1544. <sup>5</sup> Valencia, 1530.

*Speculum Visitationis*,<sup>a</sup> a treatise on the jurisdiction of visitors of corporations.

Occasionally *specula* have been associated with the names of eminent lawyers. For instance in 1870 a translation of Blossius under the name of *The Mirror for Monks* was published by Sir John Duke Coleridge, then Attorney-General, afterwards Lord Coleridge, C.J.

Enough has perhaps been said to draw the attention of the reader to a curious and almost obsolete class of books. They took advantage of a fashionable term. Some succeeded and some did not, but in any case the title was no doubt adopted with a view of attracting the customers of the bookseller. With regard to legal *specula* the bibliography is as complete as the writer can make it; with regard to others of course only some of the more interesting and important have been named. A full bibliography of these would probably mean the naming of some hundreds of volumes, and would be second in number only to the books of emblems. A list of such of the latter as are of legal interest, such as Alciati's, still remains to be compiled.

JAMES WILLIAMS.

<sup>a</sup> Barcelona, 1627.

NOTE.—The History of the word *Summa* is strikingly similar to that of *Speculum*. The theologians and the lawyers appear to have begun to use it about the same time, the former probably a little the earlier, for the *Summa Sententiarum*, attributed to Hugh of St. Victor, must have been prior in date to Vacarius' *Summa de Matrimonio* (see LAW QUARTERLY REVIEW for 1897). As some *specula* were in verse, so was at least one legal *summa*, or *ἐκλογία*, to use its Byzantine equivalent. Michael Constantine Psellus (1020-1105), wrote his *ἐκλογία* or *Synopsis* in verse of the most pedestrian kind possible. Baldus altered the term a little and called some of his writings *Summaria*. Among the more important legal *summæ* were the *Summa Placentini*, the *Summa Juris Civilis* of Azo, the *Summa Aurea* or *Hostiensis*, and the *Summa Artis Notariæ*. The greatest *summa* of all was the *Summa Theologiæ* of St. Thomas Aquinas, and this may be to some extent claimed by the lawyers, as though the work is primarily theological and ethical, it contains both definitions and discussions of legal terms and principles. In one case the writers of *summæ* and *specula* differed. There seems to have been no term used for the writer of a *speculum*, but the writer of a *summa* was classed among *summistæ*. [Like *speculum*, *summa* in its literary sense came into vogue after the period of the Corpus Juris].

## IV.—THE INTERPRETATION OF TREATIES.

*(Continued from page 9)*

THE true interpretation of the clause in dispute necessarily turns on the intention of the contracting parties in 1825, as evidenced by the record of their negotiations. These were carried on by the Russian Foreign Minister and Count Lieven (Russian Ambassador at the Court of St. James) on the one side, and by Sir Charles Bagot, our Ambassador at St. Petersburg, under the instructions of George Canning (then Secretary of State for Foreign Affairs) on the other, Bagot being subsequently displaced by Stratford Canning, specially-appointed plenipotentiary for the conclusion of the treaty. It is impossible in a short space to do more than attempt candidly to recapitulate the results arrived at by a perusal of the correspondence on both sides.<sup>1</sup> From this it appears:—

(1.) That the treaty was made principally in order to settle once for all Russia's pretensions to dominion over the Pacific in which the valuable seal fisheries were involved; the settlement of the Continental boundaries was a subsidiary matter introduced mainly in order to afford Russia the opportunity for retiring from her untenable position on the other matter without loss to her dignity or hurt to her *amour propre*.

(2.) That the boundary was to follow the crest of the chain of mountains nearest the sea, but that it was regarded as quite possible that no complete chain existed, and in that event the natural was meant to be supplemented by the artificial boundary. Thus we find that the Hudson Bay Company, on being consulted as to the Russian proposals, suggested the expediency of some more definite

<sup>1</sup> *Vide*, The Fur Seal Arbitration Papers, 1893.

demarcation on the coast than the supposed chain of mountains parallel to it.

(3.) That what the Russo-American Company and what Russia herself sought was a monopoly of trade with the Indians; and, in the words of Mr. Polatina, one of the Russian plenipotentiaries (in his report to the Russian foreign office), "the establishment of a barrier at which "could be stopped once for all, to the north and west of "the coast allotted to the Russo-American Company, the "encroachments of the English agents of the Hudson Bay "Company."

(4.) That it was urged as a matter essential to the interests of Russia that she should control the sea-board at all points. Thus she rejected the proposal that the boundary should be formed by the seaward base of the mountains nearest the sea, because she conceived that in places it might reach to the ocean. It cannot be denied that this policy is not altogether borne out by Article VI., by which the right is granted to British subjects of navigating freely and without hindrance "all the rivers and "streams which in their course towards the Pacific Ocean "may cross the line of demarcation described in Article "III. of the present Convention." But treaties are nearly always formed on the lines of give and take, and further, the right is in the nature of a licence only, and it is not clear that it would extend to ships of war.

Arguments have been advanced on the side of the United States from prescription and from the maps published since 1825. But the facts are nearly all contested by writers on the other side; and, even if they are correct, the arguments based upon them do not carry conviction. On the whole, it appears that the sea mountains were intended to form the boundary, which was to be helped out, if necessary, by an artificial line ten leagues from the coast; and, though here we are on more delicate ground,

the evidence produced in favour of a forced meaning of "*sinuosités*" is not strong enough to oust the stronger evidence and the more natural meaning that it was intended to include all the windings of this most irregular coast: bays, fiords, gulfs and inlets. Indeed, it would be hard to draw the line between gulfs that are, and gulfs that are not, "*sinuosités de la côte.*" The head of such inlets may be arrived at by ascertaining the point where (taking an average of the whole year) the salt water leaves off and the fresh water commences.

I have already referred to the Transvaal affair.<sup>1</sup> A few of the legal points in dispute may be touched upon in this connection, though I must rigidly eschew all considerations of a political character. And first with regard to the much-harassed question of Suzerainty or no Suzerainty. Mr. Chamberlain endeavoured in his despatches to import a vague suzerainty controlling our general relations with the South African Republic, and going beyond the express restrictions of the full sovereignty of that power detailed in the London Convention. He put forward the argument that the preamble of the Pretoria Convention of 1881 had not been repealed by the London Convention of 1884, but that the latter had only substituted a set of new articles in place of the old ones. Now, admitting that this could be so, disregarding Lord Derby's letter of 15th February, 1884, written immediately after the conclusion of the convention: "Your Government will be free to govern the country without interference, conforming only to the provisions of article 4"—disregarding also the fact that the Convention of 1884 has a preamble of its own, and that it is an unheard-of thing for a treaty to have only a preamble and nothing

<sup>1</sup> I am here indebted to Professor Westlake's Lecture on the Transvaal War, Cambridge, Nov. 9, 1899. *Vide*, also M. Heilbron in the *Revue Générale de Droit International Public*.

else, or for one treaty to have two preambles—disregarding, finally, the notorious and generally-accepted maxim that the narrow rules for the construction of private documents have no application to international compacts—in spite of all this, you cannot prove the existence of a suzerainty. For the suzerainty of the preamble of 1881 is not a vague term, but is defined as being constituted by the terms of the articles that follow. It is a convenient bit of nomenclature to express an aggregate of numerous restrictions, and was suggested, no doubt, by a comparison with the somewhat similar relations set up a couple of years before (by the Treaty of Berlin) between Turkey and her half-emancipated provinces. “The consideration,” says Professor Westlake, “that any other suzerainty, a word undefined in International Law, would reduce any and every Convention to a sham, is decisive.”

As to the Franchise. With regard to this, as well as to the other alleged infractions, let me repeat that while they, or many of them, undoubtedly constituted good grounds for the making of representations by our Government in the interests of its subjects, representations which might in the last resort be enforced by war, yet this consideration must be kept entirely distinct from the question: Has the treaty been broken or has it not? Now there is not a word about the Franchise in the whole Convention. Nor can it fairly be said that the reason for this silence is that it was understood that the *status quo* in that matter should be perpetually continued. For in 1882, after the Pretoria Convention, our Government had ample warning of the illiberal spirit of the Transvaal legislature, when it increased the delay necessary for naturalisation to five years. It has been said that a promise of political equality for all was made by the Transvaal during the 1881 negotiations. But a reference to the Blue Book will at once show that the con-



versation, in which Mr. Kruger said that there should be the same privileges for all as before the annexation of '77, had reference to commercial rights only, and those rights are stipulated for in black and white by Article 13 of the Convention. Then the dynamite monopoly has been put forward as an infraction of the Convention. By 1898 it had risen from 35 shillings to 85 shillings per box. It happened, it is true, to bear hardly on the Uitlanders, and on them alone. But, apart from the fact that there is nothing in the Treaty about dynamite, the grant of a monopoly was not an unjust action, since it established no distinction between burgher and foreigner, and every government has the right to discourage by taxes or imposts any trade or industry it pleases.

Some correspondence arose between England and the Transvaal in 1897 with reference to the provisions of Article 4, which enacts that:—

“The South African Republic will conclude no treaty or engagement with “any state or nation other than the Orange Free State, nor with any native tribe “to the east or north of the Republic, until the same has been approved by Her “Majesty the Queen. Such approval shall be considered to have been given if “Her Majesty’s Government shall not, within six months after receiving a copy “of such Treaty (which shall be delivered to them immediately on its completion), “have notified that the conclusion of such treaty is in conflict with the interests “of Great Britain or of any of Her Majesty’s possessions in South Africa.”

We contended that a treaty is “completed” within the meaning of the article as soon as it is reduced to what will (in the normal course of circumstances) be its final shape, and that we should be put in an invidious position if the Transvaal waited till each treaty was signed and ratified before presenting it to us, possibly to be annulled. The Transvaal in reply pointed out that, before all the processes of signature and ratification had been gone through, a treaty might be altered or avoided altogether, and in their own case the approval or ratification of the Volksraad was except in a few exceptional cases) indispensable for the

completion of a treaty. Now we have mentioned a rule of interpretation of high authority, that in treaties the part should be construed by the whole. If this rule be here applied, we are driven to the conclusion that "completion" does not mean completion as a binding contract, but completion as a literary work. For the earlier part of the article says "the South African Republic will *conclude* no treaty. . . . until the same has been approved." The meaning is, therefore, not that the English Government shall have the power of paralysing the operation of a treaty six months after it has become binding, when the mischief may have been done, but that the Transvaal shall not bind itself until it has the sanction of the English Government (tacit or express) so to do. Mr. Chamberlain declined, and, from his point of view, rightly declined to entertain the suggestion of arbitration on this point, since such a proceeding would be bound to prejudice the question of the complete international independence of the South African Republic, whereas "one of the chief objects Her Majesty's Government had in view," in including the Convention of 1884, "was to prevent the intervention of any Power."<sup>1</sup>

The Boers broke both the spirit and the letter of the Convention with regard to religious equality. It was provided that religious liberty should be respected, and that there should be equality of civil rights in spite of religious differences. It is unnecessary to recall the disabilities to which the Jews have been subjected. It has been said that such a stipulation counts for nothing, because Roumania was put under the same obligations by the Treaty of Berlin, and has openly and with impunity disregarded them. If two wrongs make a right, this argument is not absurd.

<sup>1</sup> M. F. de Martens demonstrates, in the *Monthly Review* for November, the falsity of the charge that England violated the provisions of the Hague Conference as to Arbitration.

Beyond this there was the Alien Law. By the London Convention the South African Republic was obliged to accord to strangers liberty of immigration, change of abode and of residence: In 1896 the Volksraad passed a law imposing considerable restrictions on these rights. Foreigners, it was enacted, in order to be admitted into the country for the future, "must be furnished with proper foreign passports, given by the Government of the country to which they belong, *viséd* by a Consul or consular official of the Republic." Such passports had to show *inter alia* that the immigrant had sufficient means of subsistence, or could obtain them by his work. Travelling and residing passports were rendered necessary, and had to be produced once a year. A foreigner not in the possession of one could be expelled. To Mr. Chamberlain's expostulation of Dec. 15th 1896, the Transvaal Government returned answer on May 7th of the following year, that their sovereign rights included that of protecting themselves against dangerous and undesirable persons, and they quoted Hall to the effect that in so far as a State does not expressly and distinctly contract away its fundamental rights it must be held to remain in possession of them. Of course, this begs the question. The same considerations apply to the Expulsion Law, by which the Government obtained power arbitrarily and without trial to expel a foreigner from the territory of the Republic. The point we have to determine in each case is how far these measures can fairly be regarded as necessities of police for the protection of social order. This will entail a comparison of the alien laws of the different nations which are recognised as affording free entry to the foreigner—an investigation upon which I do not propose to enter.

By establishing a protectorate over Bechuanaland, and by closing the drifts over the Vaal, and so forcing the line

of traffic from Cape Colony to Delagoa Bay, the Transvaal openly violated the Convention. But by war in the one case, and by a threat of war in the other, the wrong was righted.

I must bring this article to a conclusion here, though the subject is so large that to many a few observations like these must appear ludicrously inadequate. But they will have served their purpose if they have helped to emphasize the urgent need there is for some broad and generally-recognised principles of interpretation. If the Hague Court of Arbitration ever accomplished anything practical some of us may yet live to see the birth of a body of International Case-law, of which the construction of treaties will assuredly form no insignificant a portion. If not, we must content ourselves with the hope of the growth of a strong, educated, and uniform Public Opinion.

HERBERT M. ADLER.

## V.—THE TREATMENT OF DISCHARGED PRISONERS.

THE platform at the St. Giles' Christian Mission to Discharged Prisoners, in Little Wild Street, Drury Lane, presented an interesting sight on Thursday, the 29th of November, 1900. It was the occasion of the winter treat to some of its beneficiaries, around which many friends habitually gather. The Chief Magistrate of the Metropolis was in the chair. He was supported by Mr. Lane and many other magistrates, by the Chairman and Deputy-Chairman of Middlesex Sessions, by police authorities, prison chaplains, county councillors, philanthropic bankers, and merchants.

All came to testify to the good work of the mission, and the remarkable success of Mr. Wheatley, its superintendent, in assisting discharged prisoners and obtaining

honest employment for those committed to his care without punishment, under the merciful provisions of the Probation of First Offenders Act, 1887, and the Summary Jurisdiction Act.

There was proof of this in the hall itself. In front were some thirty young women, all neatly dressed and happy looking. They were called forward, under a number, to receive rewards for having kept the situations found for them two years or over. Then double that number of youths received like encouragement under similar circumstances. Some of the latter had also a Savings Bank Book remitted to them. They had confided a portion of their earnings to the Mission, and here was the aggregate sum invested in Government securities.

One feels insensibly sceptical about the "Patterns" it has become increasingly fashionable to put forward as object lessons at philanthropic gatherings. The iteration of one reformed character after another is apt, I am convinced, rather to freeze than to thaw the sources of supply by its monotony and (one must say) apparent cant.

But with the St. Giles' Christian Mission a very different course is taken. There, it is the reformer who testifies, rather than the reformed. Long years ago, at Scotland Yard, I made the acquaintance of Mr. Wheatley. I had been struck with the apparent helplessness of many of the Societies for the Assistance of Discharged Prisoners—as well as by frequent complaints that a discharged prisoner, or supervisee, could not retain honest employment on account of police interference. In no case did investigation into the charge show that it rested upon the slightest foundation. None the less was it undeniable that there was a want of system, a want of sympathy on the part both of the police and of the societies, as well as an absence of all police *assistance*.

Room upon room of unclaimed prisoners' property—or rather property found on prisoners and not claimed upon discharge, as likely to lead to awkward inquiries—remained stacked year after year. The Home Secretary at length approved of its being sold; it realised a considerable sum, and this formed the nucleus of a fund for the assistance of discharged prisoners. A Convict Supervision Office was established under Superintendent Neame. Its staff, both male and female, were very carefully selected. It took charge of prisoners' property and identification papers. It put itself into communication not only with societies for assisting discharged prisoners, augmenting from time to time their resources, but established friendly relations with foremen and employers willing to give a good man a trial. Its success was, and is, great.

One of its principal assistants was Mr. Wheatley. By trade a gold beater, he devoted his leisure to helping his fellow men. His success has been extraordinary, not only in obtaining employment for hundreds, not only in redeeming hundreds from a life of crime, but also in winning the approval and cordial co-operation of every criminal judge and magistrate in the metropolis. Often Mr. Wheatley is sent for and asked if he can do any good for the prisoner in the dock if remitted to his care. A very brief conversation will enable him to give a safe answer. The most artful find difficulty in deceit or hoodwinking. Mr. Wheatley is difficult to impose upon. But if the circumstances justify it he will try, and in ninety per cent. of cases success follows.

The Probation of First Offenders Act, which I had the good fortune to place upon the Statute Book in 1887, enlarging the powers of the Summary Jurisdiction Act in withholding punishment and releasing upon recognisances, greatly increased Mr. Wheatley's work. In twelve years

it has enabled not far from 100,000 persons in England and Wales—so far as can be calculated from the parliamentary returns from the six most populous police areas—to be saved from the taint of prison, and the State from the expense and trouble of maintaining them. Their average sentence would have been seven weeks, and adding 1s. 6d. per week as the proportion due for establishment charges of each prisoner in gaol, to the 8s. 6d. his food costs, shows a direct money saving to the tax payer of £30,000 at the very least, besides the ultimate gain to society. Relapses there have been, of course, but absolutely doubling the known figure of 6 per cent., they only number 12 in the hundred. Many of the 88 per cent. of those released under the Act have done well. We owe much in London to Mr. Wheatley's care. He gives a home and food to the homeless, and starts them on their way. Funds to help him are urgently needed, as the war has reduced the number of subscribers and donors.

But the St. Giles's Mission, in Brook Street, Holborn, where the Home is open to inspection, is far from being the only society in London for helping discharged prisoners. There are many others—The Royal Society, The Metropolitan, The Central Committee of the Discharged Prisoners' Aid Societies, under Mr. Arthur Maddison, at Charing Cross, the old-established Sheriff's Fund, are all doing something for the general good, while nearly every prison in the United Kingdom has a Society working in connection with it. The countenance and support long given by the prison authorities, have been placed upon an even more secure foundation, under the administration of Mr. Ruggles Brise, the Chairman of the Directors.

Nor has the good influence of the Societies been bounded by the English Channel. M. Lejeune, formerly Minister of Justice in Belgium, has been foremost among Continental reformers. Under his auspices admirable societies have

been formed in the neighbourhood of Brussels and Antwerp, and their work is zealously furthered by devoted men and women. There is also a *Congrès International de Patronage*, having its Headquarters at Brussels, with the indefatigable M. Batardy as honorary secretary. It is in close correspondence with similar associations in Paris and throughout Europe. In the French capital there is an *Union Générale des Sociétés des Patronage de France* whereof M. Petit, an ex-Judge of the High Court, and M. Desfontaines are leaders.

Last summer the Congress, meeting triennially, was held in the Palais des Congrès at the French Exhibition. It would be difficult, perhaps, to point to any very direct result of these Congresses. But attended as they are by eager and sincere men and women from many countries, they cannot fail to direct a beneficial attention to the general subject, from which good must ensue—although the application in different countries, under different laws, interpreted according to special national characteristics and traditions, must vary greatly. This result is, however, undoubted, that the different treatment of discharged prisoners, and those guilty of first offences under extenuating circumstances of youth, distress, or especial temptation, prevailing now compared to a few years ago, is not a little responsible for the decrease of crime and criminals now so happily observable as much on the European Continent as in the United Kingdom at the beginning of the Twentieth Century.

C. E. HOWARD VINCENT.



## VI.—INTERVENTION AMONG STATES.

THE question of the right of interference by one or more States in the affairs of another State may safely be dubbed at the present time as the most nebulous topic in the somewhat nebulous science of International Law. The extreme uncertainty in which the principles of the subject are at present enshrouded has discouraged the fluency even of foreign professors of International Law, and the literary output of these gentlemen on Intervention is amazingly small in view of the fact that the one especially salient feature in the international history of Europe in this century has been Intervention. The part which this country has played in that history has been considerable, and, in the main, most beneficial, although the principles by which our Governments have been guided may be sought in vain in official utterances and dispatches. The ministers who have been responsible in the matter have usually contented themselves with repeating in substance the words of the late Lord Palmerston, viz. :—"The usual rule is non-intervention, but I am not prepared to say that there may not be occasions on which intervention is justifiable." Their principles must be sought for in their international acts.

In order to discuss the subject with even the possibility of arriving at any tangible and profitable result, we submit that three stages are necessary, viz. : (1) A consideration of the analogy which undoubtedly exists between the phenomena of the international life of modern States, and the phenomena of the lives of individuals in a modern civilized State. (2) A consideration of the principal modern instances of intervention as illustrating that analogy. (3) A deduction of the principles of intervention based upon that analogy.

The consideration of the first part of the subject neces-

sarily involves some observations of a very elementary description;—(1) (a) In every civilized State there is a certain number of persons of mature age and discretion who can pay their way and are mentally and physically capable of managing their own affairs. (b) On the other hand, there are large classes of persons in every State who are under what is termed a legal disability. These classes include women (in certain respects), children under age, lunatics and imbecile persons, convicts, bankrupts, &c. The normal and natural subjects of disabilities are women and children. The abnormal subjects are lunatics and imbeciles, convicts, and bankrupts. In both cases the Central Authority of the State intervenes in the private doings of these persons for their own or for the general good, and, to a varying degree, controls their liberty of action. The interference with the action of women and children is mainly paternal in character, and is designed in the interests of the subjects of it. The interference with the other classes is, on the other hand, mainly defensive or punitive, or both. It is “not for their own but for their country’s good.”

The next point on which we would dwell is, that in all these defensive or punitive cases of disability, there is a point where the State is bound to step in for its own good. “No man liveth to himself.” A man’s house is his castle only up to a certain point. His right to preserve his privacy vanishes absolutely before the general right of humanity. Ten colliers live in adjoining cottages. When one of them cruelly maltreats his wife, the State intervenes and restricts his liberty for a couple of years or more. If the collier keeps his children at home, the State interferes and compels him to send them to school. If a man makes of his house a gambling den, or brothel, his right to the privacy of his “castle” is rudely interfered with by the civil authorities. Liberty exists only within the law among

citizens, and there is a point where that liberty vanishes because it runs counter to the general good.

Now, our main proposition in this essay is, that the international life of States is nothing more than the life of individuals "writ large." If we follow out this idea we shall find ourselves in conflict at once with what we regard as the crowning fiction of International Law, viz. :—" *That there are no degrees in independence in the eye of International Law, and that all independent States according to that law have a perfect equality of status.*" According to this theory there is no difference between the status of Turkey and that of Russia. Now, although epigrams of this kind are doubtless most soothing to the national pride—e.g., of members of the Swiss Republic—it is impossible to shut our eyes to the fact that in practice they are nothing more than fictions which are absolutely disregarded when a need arises for settling international matters. It is as absurd to assert this fiction as it would be to assert that in the modern State all its members are in an identical state of independence. Are there no wards or minors or lunatics or imbeciles or convicts whose independence of action must of necessity be interfered with?

Let us now cast our eyes over some of the main facts of the history, during this century alone, of France, Spain, Portugal, Italy, Belgium, Switzerland and Holland, and above all, of Turkey. We submit that here we find instances in abundance of States which have been dangerous lunatics, or incapable imbeciles, or hopeless bankrupts, or helpless minors, or culpable criminals. There has been, it is true, no officially established machinery as in the modern civilised State for the punishment of criminals, the guardianship of minors or the restraining of lunatics, yet the welfare of other States has imperiously demanded that this work should be somehow carried out. It was this necessity which produced seventy-five per cent.

of what we call the "Interventions" of this century. The same fiction whereby all States are deemed equally independent connotes the assertion that they are all of sound mind and competent to manage their affairs in a rational manner. There is no fact more certain in modern history than the lunacy or imbecility under which some States have laboured and continue to labour. It will suffice to mention such instances as—

(1) Poland. The lunatic perseverance with which Poland clung to what was called the *liberum veto*, which hopelessly paralysed the machinery of legislation, may be realised when we come to consider the fact that no measure could be passed by their Parliament as long as there were any dissentients at all. Consequently when it became absolutely necessary to pass some measure the procedure, according to Mr. Carlyle, for overcoming the scruples of obstinate opposers consisted in running the latter through the body. Now, if affairs were really managed in Poland after this fashion it is difficult to feel any more surprise at the partition of Poland than at the compulsory detention of an undoubted lunatic.

(2) France. There is a wide distinction to be drawn between occasional domestic cataclysms in a State and permanent derangement. Thus there is a great difference between the character of the intervention of other European powers in her affairs in 1792 and that of 1815.

In the first case the bulk of the people were endeavouring to rid themselves of a political system which was in many respects of an incredibly barbarous and tyrannical description. If the people in the course of that struggle showed themselves bereft of a sense of pity, it should be always remembered that the acts of their rulers for centuries with their private gibbets in each village had killed any such feelings they might have possessed. Although the State was passing through a fearful internal

crisis it was still able to discharge its external duties, and the intervention of the Despotic Powers in 1792 was one of political despotism against political freedom.

This interference with France on the part of Austria and Prussia in her dark hour of struggle for political liberty should be borne in mind by those who are too ready to condemn the somewhat bandit-like behaviour she afterwards displayed to those countries. If France at that time, as we firmly believe, did really represent the eternal rebellion of the free-minded citizen against the stifling weight of a hereditary *noblesse* which batted on the labour and the money of the people, while it denied them any share in the government and denied them common justice, it is no matter for surprise to us that in a little while the people who were illumined, if only for a time, by such splendid ideas of political liberty, should not only have beaten off their legitimate assailants, but should have crushed their out-worn political systems like eggshells in the Napoleonic wars which shortly ensued. The ideas of the triumphant Puritans of the English Revolution on religious toleration, on the iniquity of preferring caste to merit, and on even-handed justice to all, were fundamentally the same as the main ideas of the French Revolutionists, and in each case the same magical success attended them.

In 1815 the intervention of the Allies was quite another matter, Napoleon had gazed to some purpose on the real political disabilities of many of the States of Europe. He had tested the "Sovereign independence" of Spain, and its crazy structure of government had fallen at the first touch. His Empire, over other sovereign States, and his creation of fresh ones, were alike the result of the political incompetence of the countries in which he intervened. They were all supposed in theory to be sovereign and independent and equal. In fact they nearly all belonged to

some of the classes under disability which we have enumerated above.

Unfortunately the self-constituted guardian who had undertaken the management of their affairs was ultimately guided by personal aims and, *inter alia*, he appropriated a large part of the property of his wards. After his downfall France was treated by the Board of States, which overcame her, as a kind of unjust guardian who was obliged to make *restitutio in integrum*.

(3) Turkey. This country is the principal instance on which we rely as justifying our dissent from the views of the many writers who hold that intervention in the cause of humanity in the internal affairs of a sovereign State is never permissible.

The most lucid exponent of the views of this body of writers is probably the late Mr. W. E. Hall. "International Law," he says, "professes to be concerned only with the relations of States to each other. Tyrannical conduct of a Government towards its subjects, massacres and brutality in a civil war, or religious persecution are acts which have nothing to do directly or indirectly with such relations." We submit at the outset that this is not true. No State lives to itself. If we try this assertion by the Civil test it immediately falls to the ground. If a man ill-treats his children within the sacred precincts of his house or beats his wife with the poker, no one will assert that conduct of this kind is no concern of his neighbours. We do not of course suggest that in international affairs all tyrannical conduct or all massacres justify intervention.

In civil life mere domestic squabbles or incompatibility of temper does not justify interference by the State. As we have previously remarked, there is a great difference between a temporary political upheaval and a settled system of barbarous misrule.

Mr. Hall then continues "On what ground can Inter-

national Law take cognizance of them?" Apparently on one only, if indeed it be competent to take cognizance of them at all. It may be supposed to declare that Acts of the kind mentioned are so inconsistent with the character of a moral being as to constitute a public scandal which the body of States, or one or more States as representative of it, are competent to suppress.

*"The supposition strains the fiction that States which are under International Law form a kind of society to an extreme point. Not only in fact is the propriety or impropriety of an intervention directed against an alleged scandal judged by the popular mind upon considerations of sentiment to the exclusion of law, but sentiment has been allowed to influence the more deliberately formed opinion of jurists. That the latter should have taken place cannot be too much regretted. In giving their sanction to interventions of the kind in question, jurists have imported an aspect of legality to a species of intervention which makes a deep inroad into one of the cardinal doctrines of International Law. It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal except for the purpose of self preservation, unless a breach of the law as between States has taken place, or unless the whole body of civilized States have concurred in authorising it."*

This somewhat lengthy extract is another good instance of the late Mr. Hall's utilitarian views of the basis of International Law which we have previously noted in another Essay.

Professor Walker also says (*Science of International Law*, p. 151), "The rule regularly progresses towards more general recognition that non-intervention in the internal affairs of a State is a law which admits of *no exception to* foreign powers, so long as the operations of that State are confined in their effect to the limits of the national territory." As an instance of the opposite view on this subject we now give an extract from Professor Arntz :—

“When a government, although acting within its rights of sovereignty, violates the rights of humanity, either by measures contrary to the interests of other States, or by an excess of cruelty and injustice, which is a blot on our civilisation, the right of intervention may lawfully be exercised, for, however worthy of respect are the rights of State Sovereignty and independence, there is something yet more worthy of respect, and that is the right of humanity or of human society, which must not be outraged.”

It will be noticed that Mr. Hall speaks with contempt of the “considerations of sentiment, to the exclusion of law,” which operate on the public mind. We are fain to confess that if the principles of International Law teach us to remain passive spectators of say Armenian atrocities for the sake of a legal fiction, we much prefer the rule of sentiment to the rule of law.

The intervention of the Powers, in 1827, to put an end to Turkish misrule in Greece, although nominally based in part upon the inconvenience and damage to trade which the insurrection was causing, was, in the main, a collective act of humanity on the part of the three Powers.

Greece was continually maltreated by its self-constituted guardian, and the people of England refused to remain passively contemplating the torture of a people to whose ancestors Europe owes so vast a debt, by a horde of half-savage Mussulmans. Mr. C. A. Fyfe, in his *History of Modern Europe*, thus describes the state of things in Greece at that time: “The evils to which the Greek population was exposed whenever Greeks and Turks lived together were those which brutalised or degraded the Christian races in every Ottoman province. There was no redress for injury inflicted by a Mohammedan official or neighbour. If a wealthy Turk murdered a Greek in the fields, burnt down his house and outraged his family, there was no Court where the offender could be brought to



justice. A Mohammedan landowner might terrorise the entire population around him, carry off the women, flog and imprison the men, and yet feel that he had committed no offence against the law, for no law existed but the Koran, no Turkish court of Justice but that of the Kadi, where the complaint of the Christian passed unheeded. This was the monstrous relation that existed between the dominant and the subject nationalities, not in Greece only, but in every part of the Ottoman Empire where Mohammedans and Christians inhabited the same districts."

Surely it is absurd to assert, with facts of this kind before our eyes, that so long as the cruelties which the Turks practise on their subject peoples are confined only to those peoples, International Law is bound to erect a sort of "Wall of China" around the Ottoman Empire, and to forbid another State to interfere to prevent such hideous crimes, unless it can induce all the other great Powers to act with it. On what is all this reverence based for the inviolability of a State?

A French writer has well said :—"The State is a thing contingent, relative, eminently variable both in its limits and in its internal form. A State perhaps is simply the product of violence and has no other merit except its existence."

We entirely fail to see why a State such as Turkey, which as regards many of its dominions is merely "the product of violence" should command that religious respect for its personality which inspires such writers as M. Carnazza Amari. We might say with Talleyrand, if it were urged that such a state must exist, "We do not see the necessity." Guizot writes as follows on the state of things in Turkey. "In order that Governments and peoples may act effectually on each other by counsels, examples, meetings, and diplomatic engagements, there

must be between them a certain degree of analogy and sympathy in their customs, ideas, and sentiments, and in the great features and the great currents of civilization and social life. There is no resemblance between European Christians and Turks. They can, from necessity, from political reasons, live in peace side by side. They always remain strangers to each other. Though they have ceased fighting they have not begun to comprehend each other. The Turks have been nothing in Europe but destructive and barren conquerors, incapable of making the populations who have fallen under their yoke like themselves, and equally incapable of letting themselves assimilate to them or to their neighbours. How long shall the spectacle last of this radical incompatibility which ruins and depopulates such fine countries and condemns so many millions of men to such miseries?"

It is somewhat curious to pass from the perusal of facts of this kind into the atmosphere of legal fictions which writers such as Carnazza Amari have endeavoured to create around the subject of Intervention. According to him, "A nation which attempts to interfere with another encounters the national sovereignty of the other which alone has the right to judge the acts of its subjects, so that the foreign State in order to exercise its intervention must destroy this sovereignty to usurp its powers."

Elsewhere he says:—"Their power halting at their own frontiers, and it is never permissible for them to extend it over the territory of another."

And again:—"Every nation is wholly free within its own territory without any other jurisdiction or sovereignty over it than those of the nation. *Barbarous or civilized, lenient or violent, reactionery or progressive, it is she, and she alone, who has the right to govern the State.*"

M. Amari overlooks the fact that "she" is, after all, only a portion of humanity, and that her independence is a thing

which may be forfeited or interfered with if she endeavours from imbecility or malice to run counter to the common laws of humanity in her behaviour to her subjects, or to foreigners within her gates. M. Amari continues :—" Every corrective action of a foreign State constitutes a violent intrusion in the domain of another ; a supreme tyranny of the strong over the weak, the usurpation and the seizure of sovereign powers to which the intruder has no right, the exercise of an unlawful power, a servitude imposed by the oppressor on the oppressed."

It is natural that the views of M. Amari on the subject of Intervention should be somewhat strongly pronounced owing to the infamous system of intervention in the affairs of his own country on the part of Austria up to quite a recent date, but after we have made all allowances for this fact we still submit that in some cases of intervention it would be just as reasonable to talk in this way about oppressor and oppressed as it would be for some Bermondsey drunkard to harangue the police about their oppression, when he is arrested for the grievous bodily injury he has caused to his wife. The criminal work of International Law has to be done sooner or later by some one.

The same writer then proceeds to give utterance to the " Chinese Wall " theory of State life. " Whatever happens inside the walls," he says in effect, " has nothing to do with you." He also reproduces the fiction that the State has a kind of separate personality which is quite distinct from that of its component members. " The individuality of its members is absorbed in that of the nation to which they belong, and which represents them in their totality and in the manifestations of the activity which takes effect outside the State to the detriment of another nation. This is the reason why States can only enforce the law as regards other States in the sphere of their *international* activity ; that is to say, they can repel all acts of another State

which are to their own disadvantage, but beyond that they have no jurisdiction and no power."

From this it results that the internal autonomy which arises in the relation of governor and governed or of party and party within the body politic of the nation is not subject to the jurisdiction of stranger States because the stranger has no jurisdiction.

Intervention signifies the substitution of the stranger State for the internal autonomy of the nation, and that the former should be allowed to arraign the internal conduct of another State should never be allowed in the Law of Nations either as a rule or as an exception.

All this is entirely opposed to the truth that lies in the saying that "no State lives to itself." Nations are always passing judgments on the "interior conduct" of other nations, and it is mere twaddle to talk about "lack of jurisdiction" over the offending State if the spirit of humanity is roused by its atrocious behaviour. The right to liberty and independence exists only within the law alike in civil and in international life.

The present intervention of the Powers in China may fitly be cited as an illustration. If we are to be guided by the multitude of writers who decry intervention in the cause of humanity under any circumstances, we must regard the slaughter of missionaries and the attempted massacre of the inmates of embassies as purely domestic matters which do not concern outsiders, and in regard to which, outsiders (as M. Amari puts it) have no jurisdiction whatever.

China is not *de facto* an independent State, nor is it of sound political mind. On the contrary its political system is in a crazed condition of senile decay, and consequently the intervention of the European Powers to save the lives of their own subjects, and to ultimately abolish the barbarous Chinese polity is undoubtedly in the interests

of humanity, although the majority of the intervening Powers may be guided mainly by motives of self-interest. It is absurd to talk about lack of jurisdiction in the face of impending massacres of embassies. Napoleon's remarks on the English embassy to China in 1818 showed his estimate of the Chinese. "You ought," he said, "to humour those brutes as much as possible in order to secure trade privileges."

The question of the loss by a State of its right to freedom from interference, through criminal conduct, is closely allied to the question of a similar loss which is unfortunately entailed on a State through weakness or imbecility. One of the commonest international incidents of this century has been the occasional settlement of the affairs of some of these States by a sort of "Board" of their superiors.

We now proceed to briefly touch on the principal cases of intervention in Europe in this century, as recorded in detail by that humane and sagacious American, Chancellor Kent, whose volume is a veritable oasis among works on International Law.

The wholesale remodelling of European territorial arrangements by Napoleon is the first instance we shall quote. Among his "wards" were Spain and Portugal, the republics of Italy, the Kingdom of Westphalia; the Duchy of Warsaw, the League of the Rhine, the Kingdoms of Naples, Holland, Belgium, etc., etc. When his power collapsed a large part of it was "taken over" by the Allies. They were responsible for the junction of Norway to Sweden, of Genoa to Sardinia, of Venice to Austria, of Belgium to Holland, of Poland to Russia, and for the partial dismemberment of Saxony. The principal objection to their method of thus settling the affairs of these minor States of Europe lay in the fact that the territories thus divided were mapped out with no

regard whatever to the national instincts of its inhabitants. The inability of many of the countries whose affairs were then temporarily settled to successfully manage their own affairs has since been demonstrated. We do not propose to touch more than incidentally here on the terribly threadbare topics of the Holy Alliance and of the Congresses of Laybach Troppau and Verona from 1818-20, at which the infamous resolutions were taken against the wishes of this country to interfere in the cause of despotic government in Spain, Portugal, and Italy. It is one thing to interfere to stop the constantly repeated butchery of women and children by half-civilised religious fanatics as in the case of Armenia, but it is quite another thing to interfere, as did the Holy Alliance in a grandmotherly fashion with Spain and Naples, because the intervening Powers disliked the progress of ideas from autocracy to popular government.

The principal instances of this class of intervention in this century are the intervention of Austria in Naples 1820, that of France in Spain 1822, that of Austria in Italy 1831-2, and again in 1849, and that of Russia in Hungary 1849. The last case is more noteworthy and on a larger scale than any of the others. The Magyars, who are a strong, capable, and independent race of different origin to the Austrians, made so determined a bid for independence that they would undoubtedly have overcome the resistance of the parent State, or, rather of the Sovereign State, but for the forcible interference of Russia in the interests of autocracy. On this occasion the friends of liberty in England, who wished to assist the Hungarians, were informed by Lord Palmerston that "so far as the courtesies of international intercourse may permit us it is our duty, especially when an opinion is asked, to state our opinions founded on the experience of this country. We are not entitled to interpose in any manner that will

commit this country to embark on these hostilities." The noble Lord, it is true, had previously justified the intervention of England and France in the affairs of the Peninsula in 1834 by asserting that in any quarrel every State had a "right" in International Law to take sides with one party. England stood aloof and the Hungarians were robbed by the force of Russian arms of the fruits of their brave struggles for liberty, but the time may yet come when we may deplore the absence of a strong independent State in that part of Europe as a bulwark against Russian aggression.

As regards the delights of the Austrian yoke to which the Czar re-consigned the Magyars, no better illustration of them can be found than the case of the Austrian occupation of Italy. Italian women were publicly flogged in the streets, the peasantry were maltreated in every way and when the opportunity came, the inhabitants showed their deadly hatred of the Austrians and their system of rule. In face of what we have written about the subject of Russia and Hungarian independence it is no doubt open to the foreign critic to point to the present Boer War as a flagrant instance of the same sort on the part of Great Britain.

We submit, however, that if the facts of the case are closely considered it will be seen that the Boers were in a position which resembled that of the French *noblesse* before the revolution in some very essential matters. In each case we see a privileged hereditary minority treating an unprivileged majority as a sort of milch cow (in the words of Mr. Balfour). The minority fattens itself and grows rich on the produce of the labours of the majority and consistently refuses the latter either equal justice or equal political privileges in order to maintain its enviable position in the State.

Under these circumstances there has been much talk of "European intervention" in the Transvaal war. Never has there been a more ridiculous proposal or a greater display of false sentiment. The Boer Republics owed the

powers of self-government that had been bestowed upon them to the free grace of a great Empire. They proceeded to make use of those powers, to treat the citizens of that Empire, as far as possible, as the feudal lords of the middle ages treated their serfs, or, as the Israelites (whom they were always endeavouring to copy) treated the Gibeonites. When the Empire objected to this and proceeded to enforce a remedy, nothing less than a hysterical shriek for intervention was raised by Continental journalists who likened the struggle to the American war of independence. If we regard the unfranchised Uitlander population who paid all the taxes and had no votes as filling the position of the Americans in that war, the parallel might possibly be justified, but not otherwise. If the intervention had taken place, it would have been mainly to enable the Boers to "wallop their own niggers," which is not a very elevated object for a great international movement.

The three interventions of Great Britain in Portugal are good instances of a justifiable settlement of the affairs of a weak minor State by a powerful one. In 1826 that country, being more or less in the infancy of its newly-acquired political liberty, found its executive powers unable to resist the plotting of the friends of autocracy, and the Government asked the assistance of England. The country had passed through long years of Anarchy, and England intervened to give a helping hand to law and order. Again, in 1834, when France and England jointly interfered in Spain and Portugal, the Governments were in a state of helplessness. Don Carlos, the Spanish Pretender, had entered Portugal to raise an army for his designs on the Spanish Throne. The Portuguese Government confessed their disapproval of this, and their inability to stop it, and offered to allow a Spanish force to enter the country to effect this purpose. In an abnormal case of this kind—which was not a violent political upheaval,



bringing peace and a new order of things in its train, but was merely a desultory squabble with nothing to be hoped for but years of guerilla warfare and general chaos—it is at least arguable that England and France were justified in stepping in to patch up the decaying fabric, and help to rivet the rickety framework of government together.

The English intervention of 1847, in Portugal, was as justifiable as the other two which preceded it. It was thus explained by the English Government "The object of our interference was a recall of the Parliament in which the people could state their grievances, and restore the battles of political party to the legitimate arena of the Senate." In consequence of these views, the intervention was not confined to the forcible termination of the rebellion. The London Conference insisted on the formation of a new ministry prepared to concede liberal measures of reform to the country.

The English Intervention in Belgium in 1831, is the next instance which we shall discuss. When the union of Belgium and Holland turned out, owing to racial reasons, to be an unhappy failure, the European Powers, with the exception of France and England, appear to have been in favour of the Biblical maxim, "Those whom the Congress of Vienna hath joined together, let no man put asunder." Earl Grey, on the contrary, in justifying the action of this country said: "Is a union of the two countries to be kept up where the dispositions of both are so uncongenial, and which was originally founded on a vicious principle?" (*i.e.*, the principle of treating blood relationship as a secondary matter to geographical position). "Could the strife for separation be allowed to continue and hazard the peace of Europe? I hold the principle of non-interference as strongly as I have ever done, but I am not prepared to say there may not be proper exceptions to the rule."

The knot which had been artificially tied by the representatives of the allies in 1815 was untied by artificial means by England and France in 1831, and in view of the racial antipathies of the ill-assorted couple we do not think that many persons at the present day would affirm that the separation was anything but a beneficial act.

The intervention of Great Britain in Turkish affairs in 1840 and again in 1854 may perhaps be characterised as the only two cases in which this country has, in its continental interventions during this century, been guided in the main by interested motives which concerned *itself* more than that of the country in whose affairs it has intervened. In 1840 the circumstances of the intervention were *prima facie* of an extraordinary character. The rebellious Pasha of Egypt, Mehemet Ali, had, like the Greeks, been engaged in a long struggle with the Porte, but unlike the Greeks he was on the point of establishing his independence without any kind of external aid. On the other hand, no particular benefit to the Egyptians or to anyone else was likely to ensue from this independence. The rule of the Pasha was ultimately as barbarous as that of the Turks. There was no particular reason for sympathising with Mehemet in his efforts to substitute the sovereignty of one Oriental despot for another in Egypt. Moreover, the Powers who were represented at the London Conference had an excellent reason for preserving the Sultan's dominions intact in a well-grounded fear of the "dreams of Empire" which the Russians were known to possess. We have no intention of setting out here all the peculiarly cogent reasons which cause the British to regard the possible predominance of Russian influence at Constantinople with the utmost suspicion and aversion. It will suffice to quote one of the many luminous sentences of Napoleon in his last years on this subject. "Once mistress of Constantinople, Russia gets all the commerce of the

Mediterranean, becomes a great naval power, and, God knows what may happen. Above all the other Powers, Russia is the most to be feared by the English."

The intervention of England in Turkish affairs in 1854 was inspired by the same motives as was that of 1840. It may be pointed out that in both cases the Government of the Porte has been in the position of an incapable lunatic, unable to manage its own affairs. The Sultan Mahmud at the time of his death in 1839 was in a state of frenzy over the victories of Mehemet, and was ready to make shipwreck of his kingdom in the effort to overthrow him. His successor was most willing to take the assistance which was offered him by the four Powers. In 1854, the Porte was so far from being *de facto* a sovereign and independent State (whatever it may have been in theory), that if the two Western Powers had not taken over the task of intervening in its foreign relations, its separate existence as a State would have vanished altogether.

In 1866 Turkish misrule in the Island of Crete produced a sanguinary disturbance between the inhabitants and their oppressors. On that occasion the part played by our Government in the cause of humanity was of a somewhat edifying description. Our ministers had studied the writings of international jurists on the theoretical independence and equality of all States to some purpose, and they acted accordingly on the great fiction "Toute nation est souveraine sur son peuple terretoire et il ny a aucune juridiction au dessus d'elle." According to Calvo, "The concert of Europe fell through in great part owing to the influence of England which protested its desire to observe a strict neutrality in the quarrel, and not to give any assistance to one or the other side, and which went so far as to refuse to allow women and children exposed to be massacred by the Turks to embark on their ships of war." The freedom from jurisdiction of a State is like

that of a householder, viz., conditional on the observation of due humanity to its members.

From 1875-77 the state of affairs in the countries which are now known as Servia, Bulgaria, Roumania, Montenegro, Bosnia, the Herzegovina, and Eastern Roumelia, occupied the attention of the European Powers. When a joint intervention on the part of Germany, Austria-Hungary, Russia, France, Italy, and England was proposed, Lord Derby instructed Sir H. Elliott, at Constantinople, that "a mediation of this kind is not at all compatible with the independent authority of the Porte in its own territory. This proceeding furnishes in short a motive for insurrection as a means of exciting foreign sympathy against Turkish rule, and it is not improbable that this intervention may pave the way for ulterior intermeddling in the interior affairs of the Empire. But as the Porte has prayed your excellency not to hold aloof from the affair, the Government of Her Majesty sees that it has no other alternative." M. Calvo has well said that as a result of that conference—

"Donc l'Europe reunie en tribunal a Berlin en 1878 a solennellement reconnue le principe de l'intervention collective entre un etat et ses sujets dans l'intêret de l'humanité et surtout dans celui des nationalités."

The relations of the powers at the Berlin Conference to the Petty States which they then called into existence is that of guardian and ward. "If uncontrolled by Europe, the animosities and jealousies of Greek, Bulgars, Serbs, and Macedonians preventing them from acting in concert and leading to internecine conflicts, might quickly lead to the re-imposition of the Turkish yoke upon her former Provinces or more probably to an international conflict for the partition of Turkey disturbing the peace of the world and fatal to the independence of these little States." The same sort of guardianship has been asserted by the United

States over the smaller states of Central and Southern America in the Monroe Doctrine. The Monroe Doctrine is nothing more than an expansion of the natural sense of guardianship felt by the United States as the predominant power in that part of the world for the Minor States whose institutions are more or less modelled on their own, which is aroused when a likelihood arises of interference with their liberty or institutions on the part of a foreign Power. Monroe said :—" It is impossible for European Powers to interfere in the affairs of these States, especially on subjects which are for them vital principles, without this affecting the United States."

The United States very nearly came into collision with France when Napoleon III. made the ridiculous attempt to set up an "Emperor of Mexico" in 1861. Mr. Seward then said :—" The people of the United States has the firm conviction that progress in this part of the world is not possible except by means of political institutions identical in all the States of the American Continent."

In order to get some idea of the number of European countries whose territorial limits and affairs have been compulsorily settled for them under the guardianship of other Powers in the century just expired, it will only be necessary to mention Belgium, Holland, Switzerland, France, Luxembourg, Spain, Portugal, Sicily, Naples, Lombardy, Venice, Saxony, Poland, Cracow, Norway and Sweden, Denmark, The Danubian Principalities, The Rhenish States, Turkey, Bosnia, Servia, Roumania, Montenegro, Eastern Roumelia, The Herzegovina, Greece, and Italy.

There have been five great meetings of "Boards of Guardians" for this purpose in the course of the century, viz., in 1815, 1831, 1840, 1856, and 1878. Of these by far the most important was that of 1815. Napoleon had brought about what was practically a "re-shuffle" of the cards of the States of Europe, and consequently it remained

for the allies to execute "a fresh deal." The Boards of 1840, 1856, and 1878 have been mainly occupied with the wide subject of the tributary possessions of the Porte. We have already mentioned the Conference of 1831. The principal object of anxiety to the successive Boards has been the preservation of the "balance of power" in Europe. The theory of the "balance of power" is, as everyone knows, of great antiquity, having served as a great political principle of action to the States of Ancient Greece. The object of preserving the balance is to prevent the realisation of those "golden dreams of Empire" which are always pervading the slumbers of powerful nations. In the middle ages the Thirty Years War was mainly fought in the cause of the balance of power which was formally recognised as a great principle of International Politics at Westphalia in 1648. Again in 1713 at Utrecht the principle was formally recognised. The theory plainly arises from the strong sense of separate nationality among States. If we cast our eyes once more on the life of individuals in a State, it would seem that the family is the type in civil life of what a nation is in the company of States. In the present condition of the human race it can hardly be denied (except by a Tolstoi), that the existence of the sentiment of nationality in the one case, and of the sentiment of unity and privacy in the other, are two most beneficent factors in public and private life. Great empires over various nationalities such as Louis XIV. imagined and Napoleon realised for a brief period are mainly founded on the essential weakness of the various nations which become absorbed in them. Our own Indian Empire is a striking instance of this.

Consequently where a group of nations are more or less on an equality of civilization and their national energies are in a healthy condition, as is the case in Europe, it is natural that they should each view the idea of vassalage to any one

predominating member of their body, with a dread as great as is the affection they feel for their nationality. It would be hard to argue that the Western States were not justified in 1854 when they interfered to prevent Russia obtaining a power in Europe which would be a constant menace to the independence of the rest of the body of States.

The crushing of a nationality or its forcible absorption by another Power is an act which always produces so universal a shudder among the nations that it would seem to be instinctively revolting to the sense of mankind. Consequently we should incline to affirm that an intervention to preserve the balance of power is a natural and lawful act if its object is to preserve the independence of States against a common danger, or to save one of the number from oppression or extinction. The Austrian tamperings with Italian affairs in 1821, 1831, 1849 and 1859, and the Russian intervention of 1849 in the Hungarian contest belong to this latter category, and the action of the French Emperor in fighting the battle of Custozza for Italian liberties, appears to us to have been one of the most meritorious actions in the life of that personage. The opinion of Great Britain on the intervention by Austria of the kind we have indicated, may best be understood by the remarks of its Government when the French were illegally dallying in Rome with a body of their troops. "The foreign occupation on which the Court of Rome relies, cannot be indefinitely prolonged, nor can an auxiliary force suppress the discontent of a whole population, and even if such means were likely to succeed, it is not the kind of pacification which the British Government intends to help to bring about."

The various measures of coercion which Great Britain in company with the other great Powers, has been obliged to adopt from time to time in the case of Greece, have usually been for the purpose (as in the case of the "pacific

blockade" in 1886) of saving that irresponsible minor State from the effects of its own rashness against the Turk.

We have already briefly touched on the decayed and occasionally chaotic state of the Kingdoms of Spain and Portugal. As regards the incapacity of the Spanish Government to prevent insurrections from smouldering on in a futile and desultory manner, with no result but general disorder, it is noteworthy, in view of the latest case of intervention (viz. that of the United States in Cuba), that President Grant, as far back as 1874, said "the deplorable strife in Cuba continues without any marked change in the relative advantages of the contending forces. The insurrection continues, but Spain has gained no superiority. Six years of strife give the insurrection a significance which cannot be denied. Its duration and the tenacity of its advance together with the absence of manifested power of repression on the part of Spain cannot be controverted, and may make some positive steps on the part of other Powers a matter of self necessity."

Here we have a clear case of an imbecile personage unable to transact its affairs or keep its establishment in order for whom a committee must somehow be obtained, to put an end to the general inconvenience caused by the existing state of affairs.

The conclusions which we draw from the whole matter are, that in the natural life of the body of States, certain occasions occur at frequent intervals in which intervention by one or more States in the affairs of some other member of that body becomes a duty, either (1) directly for the welfare of that member, or (2) for the general good of the intervening State. As regards the second case, the remarks we have made as to intervention to preserve the balance of power necessarily include the case in which a State intervenes to prevent the balance being upset by its own partial or total extinction. As regards the first two cases, they



are capable of being classified under the heads of (a) minority (b) senile incapacity (c) lunacy of various degrees (d) criminality (e) prolonged bankruptcy (g) general barbarism of polity, *e.g.*, Turkey or India. This is an analogous case to minority.

Having thus stated our view of the theory of Intervention among States, we now proceed to give a brief conspectus of the interventions of the past century, and to shortly state under what head each of them ranges itself naturally, according to our theory :—

#### GROUP A.

- |   |   |  |
|---|---|--|
| Restraint on<br>Dangerous<br>Lunatic<br>States. | } | <ol style="list-style-type: none"> <li>1. Intervention of Allies in France 1815.</li> <li>2. Great Britain, Russia, Prussia and Austria in Turkey 1840.</li> <li>3. Powers in China 1900.</li> </ol> |
|---|---|--|

The first of these cases presents considerable difficulty, but the fact that the one man who then ruled the affairs of France had given proof of insane ambition in undertaking the Russian campaign of 1812, appears to justify its place in this group

#### GROUP B.

- |   |   |   |
|---|---|---|
| Meddlings<br>in the affairs<br>of minor<br>States from<br>“indirect”<br>motives, and<br>with no just<br>reason. | } | <ol style="list-style-type: none"> <li>1. Austria in Naples 1820.</li> <li>2. France in Spain.</li> <li>3. Austria in Italy 1831-2.</li> <li>4. Russia in Turkey 1833.</li> <li>5. Austria in Italy 1849.</li> <li>6. Russia in Hungary 1849.</li> <li>7. France in Mexico 1861.</li> </ol> |
|---|---|---|

#### GROUP C.

1. England in Portugal 1826.
2. Great Britain, Russia, and Austria in Greece 1827.
3. Great Britain and France in Holland and Belgium 1830-32.

4. Quadruple Alliance. Intervention of Great Britain and France in Spain and Portugal 1834.

5. Intervention of Great Britain, Russia, Prussia, and Austria in Turkey 1840.

6. Intervention of France and Great Britain in Turkey 1854.

7. Intervention of the great Powers in Turkey in 1877 with regard to Bosnia, The Herzegovina, etc.

All the cases in this group have one feature in common. The interventions were undertaken on behalf of minor States in different stages of weakness, imbecility, and decay, and in every case it is arguable, that the intervention was in the main for the benefit of the State in the affairs of which it occurred, and was salutary in its effects on that State.

F. W. PAYN.

## VII.—A PLEA FOR THE CODIFICATION OF THE LAW OF TRUSTS.

OF Codification as a general principle it is not intended here to speak ; sufficient has already been written on the question, and the arguments for and against have long since been thoroughly threshed out.

It is enough to quote the opinion of one who has studied the subject in its practical aspect, and is well qualified to judge, that "we have learned that the most "familiar argument against codification, namely, that it "checks the natural growth of the law, and hinders its "free development, though it may apply to bad, does not "apply to good codification. No country has studied law, "both historically and systematically, with more fruitful "results than Germany. In no country has codification "been more successful. Nor is there reason to apprehend "that the German Codes will arrest the progress of "German Law, whether in the form of judicial develop- "ment or legislative amendment. On the contrary, the "scientific formulation of existing rules, provided the "mistake is not made of attempting to stereotype details, "illustrates and brings into prominence their defects, and "thus stimulates their judicial development and suggests "and facilitates legislative amendments. The chief "reason why so many statutory amendments of English "Common Law have been unsatisfactory in form and in "effect is, that they necessarily take the form of excep- "tions from indefinite or imperfectly formulated rules. "If the rules were formulated, their statutory modifica- "tions would fit more easily and more naturally into the "general system, instead of being awkward excrescences "which tend to embarrass the Courts in their application "and development of general principles, and are conse-

quently regarded with jealousy and suspicion by the 'Judges.'

One form of Codification has, it need hardly be mentioned, already been introduced into our law, in the shape of the Bills of Exchange Act 1882, the Partnership Act 1890, and the Sale of Goods Act 1893; possibly there might be added the Merchant Shipping Act 1894, though this is rather a case of Consolidation than Codification in the strict sense of the word. In addition to these, bills have at various times been introduced into Parliament for the Codification of the Criminal law, the Law of Evidence, and the Law of Marine Insurance; but the two first have long since been dropped, and there appears no immediate prospect of the third becoming law.

The form in which the Acts of 1882, 1890, and 1893 have codified the law with which they deal, is to reproduce as exactly as possible the existing law, save in respect of a few matters of an uncontroversial character, in which amendment was feasible without raising opposition, and the success which has attended them has practically disposed of the arguments advanced against the system so far as they are applicable to Codification of this kind, and gives ground for thinking that it might now be advantageously extended to other branches of our system.

There are several which it is pretty generally admitted stand at the present day in urgent need of clear and accurate restatement. Such, for instance, are the Statutes of Limitation,<sup>1</sup> the Law of Copyright,<sup>2</sup> and the law relating to Bills of Sale; but in these cases the matter is complicated by the necessity for amendment as well as re-statement.

<sup>1</sup> See Art. "Codification," by Sir C. P. Ilbert, in *Encyclopædia of the Laws of England*.

<sup>2</sup> See *Pollock on Torts*, 4th ed., 195; *L.Q. Rev.*, vol. xv., 225.

<sup>3</sup> See *Scrutton on Copyright*, 3rd ed., 2.

There are again other parts of the law, the substance of which is fairly satisfactory and of which it is only the form that needs improvement.

To one of these, the Law of Trusts, a good deal of public attention has been drawn of late years owing to two causes ; first, the far too frequent loss of trust funds owing to breaches of trust, sometimes fraudulent, sometimes committed in perfect good faith, but in either case inflicting serious loss and often entailing the ruin of the beneficiaries ; and secondly, the difficulty experienced in finding persons willing to undertake the onerous duty of administering a Trust. It should be said that the term Trusts is here used in the sense of private trusts, excluding charitable trusts which stand on a somewhat different footing, and in respect of which these causes of complaint do not exist.

In the year 1895 a select Committee of the House of Commons was appointed to enquire into the matter, and ascertain whether further legislative enactment might be made for securing the adequate administration of private trusts. It was then estimated that no less than a twentieth part of the whole capitalised value of property, real and personal, that comprises the wealth of the United Kingdom, was held upon trust. Taking the capitalised value of that property as estimated by the Treasury to be between nine and ten thousand million pounds, this gives a sum of nearly five hundred millions sterling held upon trust ! Whether these figures are accurate or not, there is no doubt that thousands of people in this country are at the present moment trustees, and still larger numbers beneficiaries ; almost everyone who has any property at all, is at some time of his or her life concerned in the one capacity or the other, with this branch of the law. Yet how many, unless they be lawyers themselves, can under the existing condition of things have anything more than the most rudimentary notions of their rights and duties ?

The latest edition of the leading text book on the subject covers 1,252 closely-printed pages of text, and contains references to over eight thousand cases. Such a book cannot be familiarly known even by a lawyer, while for the layman any dealing with it is a practical impossibility. Even the lawyer not infrequently goes wrong in such a condition of the law. An eminent practitioner at the Chancery Bar, lecturing on the duties and liabilities of trustees some time since, gave an apt illustration of this. "Towards the end of last sittings," he said, "and almost at the close of a case relating to trustees then being tried in the Chancery Division, it became apparent from an observation made from the Bench, that all the four counsel engaged in the case, learned and experienced men as they were, had not considered the provisions of the most recent Trustee Act, that of 1894, though such provisions bore directly upon the subject matter."<sup>1</sup> It is not to be wondered at when the law, to use the lecturer's phrase, "lurks in volumes of reports to be counted by hundreds, or lies buried, but with a hideous power of inopportune resurrection, in some partially repealed statute."

The writer once had occasion to enquire into the exact limits of the rule in *Howe v. Lord Dartmouth*. For this purpose it was necessary to examine over fifty reported cases, the result of all of which could easily be stated in six or seven lines. It is fortunately not often requisite to do this in practice, but when it is, the burden is so great that it generally is not done at all. Surely it would be a boon to many, both lawyers and laymen, if the general principles of the Law of Trusts were now to be succinctly stated in clear and precise language in the form of a Code of the type of the Bills of Exchange Act, the Partnership Act, or the Sale of Goods Act.

<sup>1</sup> Birrell's *Lectures on Trustees*.

It is not infrequently said that the layman is no better off when the law is codified, and it must readily be admitted that it is hopeless to expect to make the law, as a whole, known to the general public. Even such an ardent advocate of codification as John Austin admitted this.<sup>1</sup> But where a layman wants to acquire a knowledge of some particular branch of law in which he is specially interested, there is reason for believing that codification does materially assist. His Honour Judge Chalmers states in the introduction to his *Digest of the law of Bills of Exchange*<sup>2</sup> that merchants and bankers say that it is a great convenience to them to have the whole of the general principles of the law of bills, notes and cheques contained in a single act of a hundred sections. No one imagines, of course, that breaches of trust would cease to be committed if the Law of Trusts were codified, but is it unreasonable to hope that trustees would be better acquainted with their powers and duties, that beneficiaries would be better acquainted with their rights, and so better able to protect themselves, and that consequently breaches of trust might be of less frequent occurrence than is now unhappily the case?

Nor would the task of codifying the Law of Trusts be a matter of insuperable difficulty. An excellent model already exists in the shape of the Indian Trusts Act 1882, which although framed with a special view to the necessities of India, and differing in some respects from English law, is nevertheless admittedly based on the latter.<sup>3</sup> Besides this nearly the whole of the Statute law, which properly belongs to the subject, has already been consolidated in the shape of the Trustee Acts 1893 and 1894, and the Judicial Trustees Act 1896. Why should not these

<sup>1</sup> *Lectures on Jurisprudences*, vol. ii., 5th ed., 653.

<sup>2</sup> p. xlv.

<sup>3</sup> See Dr. Whiteley Stokes' introduction to the Act in the *Anglo-Indian Codes*, vol. i.

Acts, with the addition of the rules now represented by case law, for the drafting of which the Indian Trusts Act would serve as a guide, be re-enacted on a more scientifically arranged basis?

As a matter of fact, a Bill to codify the Law of Trusts was introduced in the House of Lords by Lord Halsbury in 1892, but got no further than a first reading. This was not altogether surprising, for although in its preparation use was made of the Indian Trusts Act, the Bill as introduced was hardly satisfactory. It was confessedly incomplete. The prefatory memorandum attached to the Bill stated that it did not pretend to be an exhaustive statement of the law. It consequently met with but scant approval, and in the following year when it reappeared it was in the form of a Bill to consolidate the Statute law only, which afterwards became the Trustee Act 1893. Lord Herschell, in introducing this measure, explained that the alteration in form was due to the criticisms which the previous Bill had evoked. The fact, however, that a hastily drafted and imperfect bill failed to secure approval, is no reason why a carefully prepared code on the lines of the Bills of Exchange, Partnership, and Sale of Goods Acts should not enjoy a better prospect of success, especially if its promoters refrained from attempting any amendment, but contented themselves with a clear statement of existing law.

It is necessary, however, to find someone to initiate the work. This is the chief difficulty. Unless the thing is undertaken by some public body, or person of influence, there is little prospect of its being successfully submitted to Parliament. The Bills of Exchange Act, for instance, was drafted by Mr. Chalmers on the instructions of the Institute of Bankers, and the Bill was introduced to Parliament by Lord Avebury (then Sir John Lubbock), the President of the Institute. To this fact its comparatively



speedy approval by the legislature is no doubt mainly due ; similarly the Partnership Act was promoted under the auspices of the Associated Chambers of Commerce ; while the Sale of Goods Act found a sponsor in Lord Herschell, always ready to lend his aid to any reform in the law.

Is there anybody to perform the same office for a code of Trust Law? Would it be too much to hope that the Incorporated Law Society might be induced to undertake the task? A very large number of solicitors are trustees themselves, nearly all are constantly concerned in advising trustees as their clients and assisting in the administration of trusts. "There is no subject which occupies our attention more or fills a larger place in our daily business than the administration of trusts," said Mr. Wreford Budd in his Presidential address at the annual provincial meeting of the Society at Liverpool in 1895. The Society has always been in the van of law reform, as is testified by the part it has played in promoting the Judicature Acts, the Conveyancing Acts and the Settled Land Acts ; without enumerating the very important amendments of the branch of law now under discussion which are due to its initiative. Representing solicitors as a corporate body it would surely be conferring a benefit not only on its constituents but on the public, with whose interests those of its constituents are in the long run identical, by interesting itself in this needful reform.

WALTER G. HART.

## VIII.—SEAMEN'S ADVANCE NOTES.

THE question of the advance of wages to seamen has frequently occupied the attention of the Legislature. The earliest Act dealing with it is 8 Geo. I. c. 24, passed in 1721, entitled "An Act for the more effectual suppressing of Piracy," which is still in force. After reciting that desertion whilst abroad is the chief occasion for seamen turning pirates, and is chiefly occasioned by the payment of wages to the seamen when abroad, it enacts that no master or owner of any merchant ship or vessel shall pay or advance, or cause to be paid or advanced to any seaman or mariner, during the time he shall be in parts beyond the seas, any money or effects upon account of wages exceeding one moiety of the wages which shall be due at the time of such payment, until the return home of such vessel.

But it was not until 1845 that the question in its narrower aspect was dealt with. Sailors are notoriously improvident, and, as a rule, only return to sea when they have spent all their earnings of the previous voyage, so that when they sign articles, their pockets are empty, and an advance of wages in some shape or form is essential to enable them to pay their boarding-house bill, redeem their kit, and come aboard equipped for the new voyage. If money were given to them by the shipowners for this purpose, it would, in the majority of cases, result in their spending it recklessly, and then not joining the ship. In order to avoid as far as possible this contingency, a system grew up of issuing "advance notes," by which the owner or master undertook to repay a certain sum (to be advanced by a third person to the seaman) within a specified time after the ship's sailing, provided the seaman sailed in her. The advance note was, as a rule, either in the form of a conditional bill of exchange drawn by the

master upon the shipowner and accepted by the latter, or of a conditional promissory note, the condition being that the seaman should sail in the vessel. By this means, the strongest inducement was held out to the person who cashed the note or advanced goods against it, to take effectual means of keeping the sailor to his engagement; for if the ship sailed without him the note would be void owing to non-fulfilment of the condition.

In 1845 the Seamen's Protection Act (8 & 9 Vict., c. 116) was passed, which prohibited (s. 7) anything in the nature of an advance note being given until six hours after the signing of the ship's articles, and it could then be given only to the seaman himself. The object of this enactment, no doubt, was to ensure that the seaman should be secure of his berth before he got the note, and thus saved from the necessity of parting with it to a crimp, or boarding-house runner, in order to secure the berth; for the preamble of the Act recites as follows:—"Whereas the seamen of this kingdom have been for several years past subjected to grievous impositions and great injustice by certain persons who undertake to procure seamen to enter on board merchant ships who have no interest in the said ships."

The above provision of the Act of 1845 was repealed by the Mercantile Marine Act, 1850 (13 & 14 Vict. c. 93, s. 58), and, in lieu thereof, it was enacted (s. 59) that no advance note should be made except in forms sanctioned by the Board of Trade, that none should be given to any person but the seaman himself, or unless the agreement contained a stipulation for the same and an accurate statement of the amount thereof, and that no advance note should be given to any seaman who signed the agreement before a shipping master, except in the presence of such shipping master, or, except in the case of a substitute, until four hours after the agreement had

been so signed. An advance note given in breach of these provisions was (s. 60) to be treated as a nullity, and no one could be sued upon it unless he was a party to the breach. It was further enacted (s. 61) that whenever any advance note was discounted for any seaman, he was to sign or set his mark to a receipt endorsed on the note, stating the sum actually paid or accounted for to him by the person discounting it, and such person might, after the expiration of ten days from the final departure of the ship from the last port of departure in the United Kingdom, sue for and recover the amount promised by the note with costs, either from the owner, or from any agent who had drawn or authorised the drawing of the note, and in any such proceeding it should be sufficient for such person to prove that the note was given by the owner or by the master or some other authorised agent, and that it was discounted to and receipted by the seaman, and the seaman was to be presumed to have gone to sea with the ship and to have duly earned, or to be duly earning his wages, unless the contrary was proved.

The next Act bearing upon the subject was the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which provided (s. 149) that the agreement between the master and crew, which was to be entered into in the case of every ship (except ships of less than eighty tons registered tonnage, exclusively employed in trading on the coast of the United Kingdom) should be so framed as to admit of stipulations—to be adopted at the will of the master and seaman in each case—as to advance and allotment of wages. This was quickly followed by the Merchant Shipping Amendment Act, 1854 (17 & 18 Vict. c. 120), which (by s. 4) wholly repealed the Mercantile Marine Act, 1850, and also, all such laws, customs, and rules as were inconsistent with the Merchant Shipping Act, 1854. The result was that every seaman was free to enter into any agreement he

chose to make with the master as to advance of wages. So the matter stood until 1880, when the Merchant Seamen (Payment of Wages and Rating) Act (43 & 44 Vict. c. 16) was passed, by which it was enacted (s. 2) that after the 1st of August, 1881, any document authorising or promising, or purporting to authorise or promise, the future payment of money on account of a seaman's wages conditionally on his going to sea from any port in the United Kingdom, and made before those wages had been earned, should be void. Advance notes were thus rendered void. But the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46) again rendered them valid under certain conditions. It enacted (s. 2) that any agreement with a seaman made under section 149 of the Merchant Shipping Act, 1854, might contain a stipulation for payment to or on behalf of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman under the agreement, but, save as authorised by this section, any agreement by or on behalf of the employer of a seaman, for the payment of money to or on behalf of the seaman, conditionally on his going to sea from any port in the United Kingdom, should be void, and no money paid in satisfaction of or in respect of any such agreement was to be deducted from the seaman's wages, and no person was to have any right of action, suit, or set off against the seaman or his assignee, in respect of any money so paid or purporting to have been so paid.

These provisions of the Merchant Shipping Act, 1889, are re-enacted by section 140 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which is the statutory enactment now in force regulating the conditions under which advance notes may be given. This Act does not render them negotiable. They are

not negotiable under the Bills of Exchange Act, being payable only on the contingency of the seaman sailing in the ship; nor—apart from any question as to the effect of modern mercantile usage—are they negotiable by the law merchant. In practice they nearly always fall into the hands of the authorities of the Sailors' Homes, or of boarding-house masters at the various ports, by whom they are in due course presented to the shipowner for payment; and if the condition has been fulfilled they are invariably paid without question. Occasionally actions have been brought upon these notes; and it has sometimes been argued that they are negotiable instruments. If this were so it could only be by virtue of modern mercantile usage.

In *Cardiff Boarding Masters' Association v. Cory and Sons* ([1893] 9 *Times* L. R. 388), an advance note in the common form was held not negotiable; but no evidence of general usage seems to have been tendered in that case; and the question may still, possibly, have to be answered in connection with these notes, can modern usage, if established, vary the ancient law merchant? On the one hand, it is said in the judgment of the Exchequer Chamber in *Goodwin v. Robarts* ([1875] L. R. 10, Exch. 337) that the law merchant is not fixed and stereotyped; that it is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience,—the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing

of any custom or usage prevailing generally in the particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. On the other hand, it is said in *Crouch v. Credit Foncier of England* ([1873] L. R. 8, Q. B. 374) that although modern usage if general may annex incidents to contracts, yet if the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, it cannot be annexed by the tacit stipulation arising from usage. And, applying this principle, it would be said that to attach the incident of negotiability to advance notes would conflict with that principle of our law by which the assignee of a *chose in action* takes it subject to all equities attaching to it in the hands of his assignor.

If these cases are in conflict, as was held to be the case by Kennedy, J., in *Bechuanaland Exploration Company v. London Trading Bank* ([1898] 2, Q. B. 658), the question is what constitutes the law merchant? To say that it is capable of no expansion whatever, and is now exactly what it was in the earliest times would be no less absurd than to allege that it is capable of altering and fluctuating from day to day, so that there could never be any certainty about it. Mercantile law, which is always described as part of the Law of Nations, probably owes its origin to the fact that in early times, when merchants assembled from all parts in the great markets of the world, it was necessary that disputes should be settled on the spot, before the merchants dispersed again; and the only means of doing this was to submit the disputes to the assembled merchants, who naturally were guided in their decisions by the mercantile usages with which they were acquainted.

Principles were thus established which became the laws administered by the local courts, and which were treated by the superior courts as *customs* which had to be proved, speaking broadly, much in the same way as foreign law now is. It was a question of fact, and merchants spoke to the existence of their customs as foreign lawyers speak to the existence of laws abroad. "Before that period" (Lord Hardwicke's time) says Buller J., in *Lickbarrow v. Mason* (2 T.R. 63), "we find that in the courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle.' Even as late as the end of the 18th century it was the practice in actions on bills of exchange to allege in the declaration that the plaintiff sued, "according to the custom." But one of the essentials of a good custom is, that it shall have been used so long that the memory of man runneth not to the contrary, so that if any one can show the beginning of it, it is no good custom (cf. Co. Litt. 110, 113). Now unquestionably advance notes have not, since their inception, been always negotiable; for by 13 & 14 Vic. c. 93, s. 61, the right to sue upon the note is at least implicitly restricted to the person who discounts it, so that any custom which may have sprung up to treat it as a negotiable instrument is not one going back to such time as that the memory of man runneth not to the contrary. It would no doubt be to the interest of the seaman if these notes were made negotiable, because in that case a transferee, who took one in good faith without notice of any equity attaching to it, would run no risk; so that he would be the more inclined to give full value for the note; whereas as a non-negotiable instrument he must take it more or less as a speculation.

One would have supposed that a seaman stranded abroad would be even more liable to imposition and consequently more in need of protection than one at



home. But by a curious anomaly the provisions of the Merchant Shipping Act relating to advance notes do not apply in the case of seamen shipped abroad. (See *Ritchie v. Larson* [1899] 1 Q.B. 727; *Rowlands v. Miller* [1899] 1 Q.B. 735). In the latter of these cases, Miller was engaged at San Francisco to serve as A.B. on a British ship at wages of £4 per month. But, under the terms of his agreement, he received an advance note for £8 5s. 8d., which he passed to the crimp who had procured his engagement, and which was duly honoured. On arrival in England he was tendered his wages, less this sum of £8 5s. 8d., for which, he, however, refused to allow credit on the ground that the advance note was bad as exceeding the amount of one month's wages, and that, otherwise, an assignment of wages before they had accrued due was void by section 163 of the Merchant Shipping Act, 1894. The Court, however, held that credit must be given for this amount.

The reported cases in reference to advance notes are not numerous. The earliest was *McKunc v. Joynson* ([1858] 5 C.B. (N.S.) 218), in which the note was in the following form :—

“Agreement made at Liverpool this 10th day of March, 1857.

“Ten days after the ship *Athlone* sails from the port of Liverpool, the undersigned does promise and agree to pay any person who shall advance £6 to “Reuben Hill on this agreement, the sum of £6, provided the said Reuben Hill “shall sail in the said ship from the said port of Liverpool.

“(Signed) D. S. JOYNSON.

“Payable at Joseph Yeoward's, Water Street.”

The defendant, who was master of the *Athlone*, had given this note, signed by him, to Reuben Hill, one of the crew, who brought it to the plaintiff, receiving for it an advance of £3 5s. in cash and wearing apparel worth £2 15s. Reuben Hill sailed in the *Athlone*, and after the lapse of ten days from the date of the ship's sailing, the plaintiff, having been refused payment of the note, brought this action. It was objected, on behalf of the defendant, that the condition of

the contract had not been fulfilled, since £6 had not been advanced *in cash*. But it was held by Cockburn C. J. and Byles J. (Willes J. dissenting), that the plaintiff was entitled to recover. Cockburn C. J., in the course of his judgment, says:—"These notes, as stated by Mr. Brett, "have been in use for many years, and have been found "to be extremely useful. The object is that the sailor "shall not receive an advance in hard cash from the "owner before the ship sails, as it is well-known how "improvident sailors are, and that if they had it in their "power they would spend all before they sailed; whereas "by means of these notes, payable after the ship has sailed, "the sailor is enabled to get clothes and those things which "are essential for his comfort during the voyage. If you "say, therefore, that there cannot be an advance in clothes "on these notes, you will in effect destroy their operation." Willes J. thought there was no proof that the sailor had taken the clothes as an equivalent for the sum of £2 15s., which the defendant alleged to be the value of them; and he was, therefore, not satisfied that the condition of the note had been complied with.

*Reg. v. Howie* ([1869] 11 Cox, C.C. 320) was the case of an indictment charging the prisoner with the forgery of a "promissory note or order" for payment of £4. The document was in the following form:—

"B. £4 0s. od.

"Agreement made at Liverpool, this 16th of June, 1869.

"Ten days after the ship *Candidate* sails from the port of Liverpool the undersigned do hereby promise and agree to pay to any person who shall advance four pounds to J. A. Howie on this agreement the sum of four pounds, provided the said J. A. Howie shall sail in the said ship from the said port of Liverpool.

"(Signed) J. H. ISMAY AND CO.

"Payable at 10, Water Street, Liverpool.—H. PALMER, Master."

It was objected that the indictment was bad on the ground that the document was neither a promissory note nor an order for the payment of money. And Hannan J. upheld the objection, saying:—"An advance note being

“an agreement to pay under certain conditions removes it from the class of promissory notes or cheques, which are peremptory orders to pay, without any condition affixed to them.”

*Cardiff Boarding Masters' Association v. Cory and Sons* ([1893] 9 *Times L. R.* 388) was an action by the holder of an advance note in the following form :—

“Three days after the ship *Itollo* sails pay to the order of Thomas Connor £3 5s. for advance of wages not exceeding a month's wages, provided he proceeds in the ship from the dock.”

It was drawn by the Master to the order of Thomas Connor, a sailor on board. Connor went in the ship out of dock, but left at Lundy Island on the ground that the ship was, as he alleged, unseaworthy. He was, however, prosecuted and convicted for unlawfully leaving the ship. The note was transferred to the plaintiff who sued the shipowners upon it. It was held that the action could not be maintained. Pollock B. says :—“It was certainly bad as a bill of exchange and did not enable a transferee to recover upon it. A bill or promissory note must be payable at a fixed time or on some event which must occur. But this note was quite uncertain; for it was to be payable three days after the ship sailed, and provided the seaman sailed in it.” He points out that for a long time advance notes were held bad: and that the Act of 1889, which made them again legal, did not, however, alter the law as to assignment of such notes.

In *Bellamy v. Lunn* ([1897] 77 *L. T. (N. S.)* 396) an advance note was given to a seaman in the following form :—

“Advance note £2.—This note should be presented immediately for acceptance.

“Five days after the ship *Willowdene* leaves Plymouth pay to the order of R. D. Montgomery (provided he sails in the said ship and is duly earning his wages according to his agreement) the sum of Two Pounds, being half month's advance of wages.

“JAMES TIPPETTS, Master.

“Messrs. Bellamy & Co., payable at S. Side, Plymouth.

"The seaman must write his name on the back hereof. By this act he will understand he is conveying to another the value of the note. If he cannot write, his mark must be attested by a witness, not the discountor or recipient."

"N.B.—The seaman must join the ship at the time fixed, or a substitute will be appointed."

Four days after the *Willowdene* left Plymouth on a voyage to Baltimore the seaman was discharged at Barry, and the master instructed Bellamy and Co., who were the ship's agents at Plymouth, not to pay the note as the seaman had not completed the five days. But on the note being subsequently presented to them for payment by a third party, who was a *bona fide* holder for value, Bellamy and Co. considered themselves bound to pay them, and accordingly did so, and demanded repayment from the shipowners, which was refused. Bellamy and Co. then brought this action against the shipowners for the amount of the note; but it was held that as Montgomery was not earning his wages at the end of five days after the *Willowdene* left Plymouth, the condition of the note had not been fulfilled, and accordingly neither the shipowners nor Bellamy and Co. were liable upon it, and therefore Bellamy and Co. could not recover against the shipowners.

G. D. KEOGH.

#### IX.—THE COMPANIES ACT, 1900.\*

THIS Act, which was passed after several years' deliberation and a careful consideration of the views of judges, lawyers, and men of business having great experience in company matters, has been made the subject of a large number of special treatises by legal writers already distinguished in the department of Company Law, of which we give a fairly complete list of titles in the footnote.

\* (1) *The Companies Act, 1900.* By F. B. Palmer. Stevens and Sons.

(2) *The Companies Act, 1900.* By A. H. Ruegg, Q.C., and L. Mossop. Butterworth.

We propose to consider the chief provisions of the Act before noticing the works on the same.

The first section of the Act makes a certificate of incorporation conclusive evidence thereof, and the sections subsequent to the twenty-fifth are little more than formal ; the most material part of the Act being the twenty-four sections numbered from 2 to 25. This part of the Act is divided into eight portions, headed respectively :—

- (i.) Appointment and Qualification of Directors (ss. 2, 3).
- (ii.) Allotment (ss. 4-8.)
- (iii.) Prospectus (ss. 9-11.)
- (iv.) Statutory Meeting (ss. 12-13.)
- (v.) Mortgages and Charges (ss. 14-18.)
- (vi.) Annual Summary (ss. 19, 20.)
- (vii.) Audit (ss. 21-23.)
- (viii.) Winding-up (ss. 24-25.)

On the first of these subjects, the second section of the Act provides in effect, that in the case of any company issuing a prospectus, no person shall be appointed a director by the Articles or named as such in the Prospectus, unless he shall previously have signed and filed with the

(3) *Notes on The Companies Act, 1900.* By L. Worthington Evans, with a Chapter on Auditors, by F. W. Pixley. 4th Edition. Ede and Allom.

(4) *A Practical Guide to Company Law.* By E. Manson. Shaw and Sons ; Butterworth.

(5) *The Companies Act, 1900.* By P. F. Simonson. Effingham Wilson ; Sweet and Maxwell.

(6) *The Companies Act, 1900.* By Gibson, Weldon, and Bilbrough. *Law Notes Publishing Offices.*

(7) *The Companies Act, 1900.* By J. W. Reid. Gee and Co.

(8) *Handy Book on Joint Stock Companies.* By F. Gore Browne and W. Jordau. 23rd Edition. Jordau and Sons.

(9) *Practical Manual to the Companies Acts.* By W. A. Waterlow and J. S. Risley. 12th Edition. Waterlow Bros. and Layton.

(10) *A Handbook to the Companies Act, 1900.* By F. E. Bradley, LL.D. Second Edition and Second Thousand. W. Clowes and Sons ; Manchester : J. Collins and Kingston.

(11) *The Companies Acts, 1862 to 1890.* A Chart. Compiled by T. L. Wilkinson. Effingham Wilson.

Registrar of Joint Stock Companies a consent to act, and shall also have signed the Memorandum of Association for his qualification shares, or signed and filed a separate contract to take them from the Company.

This section is aimed at destroying the practice of a vendor selling property to a company at an excessive value, taking part payment in shares, and giving some of them to persons with grand names and parading these names in a prospectus, as if the parties had invested their own money in the concern.

Section three requires a person who is appointed a director to obtain his qualification within two months after appointment, and in default declares his office vacated, and makes him liable to pay to the company £5 per day if he continues to act. The period of two months may be shortened by the regulations of the company, but not lengthened.

On the subject of Allotment the fourth section implies that the Memorandum or Articles may specify a minimum subscription, and enacts that no allotment shall be made unless it is reached ; and adds that if no minimum subscription is specified, then no allotment shall be made unless the whole amount of capital offered for subscription is covered. The subscription must include payment of the application money, and the same must not be less than five per cent. on the amount of each share. If these conditions are not fulfilled within forty days after the first issue of the prospectus the application money must be forthwith returned.

The effect of the fourth section is further defined by the fifth, which enacts that an allotment in contravention of the fourth section shall be voidable by the applicant within one month after the statutory meeting, but not later ; and adds that any director contravening the fourth section shall be liable to compensate the company and the allottee for

all damage sustained thereby, and fixes two years as the limit within which an action may be brought.

The sixth section forbids any company to commence business or exercise any borrowing powers unless shares have been properly allotted up to the minimum subscription, and unless every director has paid the full amount of application and allotment money in respect of his shares ; and unless a statutory declaration deposing to these matters has been filed with the Registrar.

The seventh section requires a return to be filed of all allotments ; and, in the case of allotments otherwise than for cash, the consideration and other particulars are required to be stated.

The eighth section allows a commission to be paid to any person for subscribing for shares or procuring subscriptions, provided that the same is authorised by the articles and disclosed in the prospectus.

On the subject of the Prospectus, the ninth section enacts that a copy shall be signed by every person named in it as a director, or proposed director, and filed with the Registrar on or before the date of its publication.

The tenth section states what every prospectus must contain. It has been carefully framed to insure disclosure of every material matter ; and the list of requirements is necessarily a very long one.

With respect to the Statutory Meeting we think that that title ought to have preceded the eleventh section instead of following it ; for that section enacts that prior to the statutory meeting, a company shall not vary the terms of any contract mentioned in the Prospectus, except subject to the approval of the statutory meeting.

The twelfth section requires a statutory meeting to be held not less than one month, nor more than three months, after the company is entitled to commence business. It requires the directors, at least seven days before the meet-

ing, to send to every member a report specifying the shares allotted, the consideration for each allotment, the receipts and payments on capital account, the names and addresses of the officers of the company, and other particulars. A copy of this report is to be filed with the Registrar. The meeting may adjourn, and so enable notice of any proposed resolution to be given.

The thirteenth section directs a meeting to be held, if required at any time, by the holders of one-tenth part of the capital of the company.

With respect to Mortgages and Charges, section fourteen requires every document in the nature of a debenture security to be filed with the Registrar within twenty-one days after its creation, and in default it declares any such document void against the liquidator and creditors, but not so as to prejudice a claim for repayment of the money secured by it. This provision applies to (1) debentures *co nomine*, (2) mortgages of uncalled capital, (3) bills of sale within the meaning of the Bills of Sale Acts, and (4) floating charges on the undertaking or property of the company.

The Registrar is directed to register certain particulars of every document so filed, and evidently the filed document is to be returned to the party filing it. The register is to be open to public inspection, and every company is directed to keep a copy of every registered charge, and permit it to be inspected by all members and creditors of the company.

Section fifteen gives power to the High Court to extend the time for registration and to correct errors in the register; and the sixteenth section authorizes the Registrar to enter satisfaction of any charge on production of evidence satisfactory to him.

With respect to the Annual Summary required by s. 26 of the Act of 1862, section nineteen of the present Act



directs that it shall be framed so as to distinguish between shares issued for cash and for other considerations, and that it shall specify the total amount of indebtedness in respect of mortgages and charges requiring registration. So far as regards the first of these requirements we may observe that the form of annual summary at present in use goes a little beyond the words of s. 26 of the Act of 1862, and specifies explicitly the "Total amount (if any) agreed to be considered as paid on ——— shares £———." The same section requires the names and addresses of the directors to be included in the annual summary; and section twenty extends ss. 45 and 46 of the Act of 1862 to all companies, thus requiring these particulars to be registered at the office of the company, and any change to be notified instantly to the Registrar.

On the subject of Audit, the twenty-first section directs the company to appoint an auditor or auditors at each annual general meeting; and the twenty-third section enacts that each auditor shall have access at all times to all the books of the company. The auditor is thus made a standing officer, with power to inspect the accounts at all times, and not merely a stranger called in once a year to verify a summary prepared by the manager and directors. It is also declared that auditors shall be entitled to require information from the directors and officers, and shall sign a certificate at the foot of the balance-sheet stating whether all their requirements have been complied with, and shall make a report on the accounts and on every balance-sheet stating whether it is properly drawn up.

On the subject of Winding-up, section twenty-five enacts that in a voluntary liquidation it shall be lawful for any creditor to apply to the Court under s. 138 of the Act of 1862 to have any question decided. This right was only given to the liquidator and contributories by the section named, with the result that if a creditor desired to raise

any point it was necessary for him to obtain a supervision order, or to take some independent proceeding. He is now empowered to apply under s. 138 of the Act of 1862, and it is probable that the need of supervision orders will thus be obviated.

We believe that we have now given our readers a short summary of the principal provisions of the Act, but we must refer them to the Act itself for accurate information, as it contains numerous qualifications and extensions which we have omitted for the sake of brevity and clearness. It inflicts numerous penalties and gives various rights of action, but the writers of the valuable books before us point out that there are some cases in which the Act does not clearly indicate the consequences of a neglect to comply with its provisions. These points must be left to be settled by decisions, but our authors are able to show us what some of these decisions are likely to be, according to the analogy of similar questions which have arisen and been settled under other Acts of Parliament.

The Act has been prepared with so much care and under the guidance of such very high authorities, that we feel a diffidence in criticising it; but we may point out some alterations of the law, which had been mooted, but which have not been adopted.

Attention had been called to the anomalous position of debenture holders. When a company goes into liquidation, all its assets are applied in paying its debentures in the first instance, with the result that other creditors get little or nothing. The law has abolished the distinction between specialty and simple contract debts in the case of administering the estates of individuals, but in the case of companies it makes a striking difference between the creditor with a document charging all the assets of the company, and the creditor without it. Reformers have urged that a company ought not to have

any greater power of creating a charge upon any property than an individual has; or, at least, that the holder of a charge which leaves the company at liberty to carry on its business should be postponed to the claims of all creditors which were bound to accrue in the course of such business. But these suggestions have not been adopted. A registration of debenture charges is certainly required, but even if that is complied with the debenture holder has the same advantages as before.

Another point is that registration is only required of charges in the nature of debentures. A company may mortgage real estate up to the hilt and beyond it, and can keep the public in ignorance of all such liabilities. There is no need to register them, nor to include them in the annual summary. Furthermore, the effect of certain recent decisions is to allow a company gradually to eat up its capital, or to write off lost capital without obtaining the authority of the Court for its reduction; and there is nothing in the Act which requires the effect of these operations to appear in the annual summary. The question of requiring the registration of an annual balance-sheet was freely discussed, and was rejected by the framers of the Act.

It appears to us that in the preparation of this Act the questions were not looked upon from the point of view of the agent of a trade protection society endeavouring to investigate the position of a company with the view of advising whether substantial credit might safely be given to it. An annual summary of all the assets and liabilities of the company would be necessary in order to enable that to be done.

The Act also directs every prospectus and first report to fulfil a long list of requirements, and to be filed, and directs many other documents to be filed or registered also. It must necessarily follow from this that it will become the

duty of the Registrar and his staff to ascertain that the documents brought for filing and registration conform to the Act, and they will thus be gradually transformed from a ministerial into a judicial body. This is especially the case in the matter of registering satisfaction of charges. We are far from saying that this transformation is undesirable; indeed, it was urged as a solution of the difficulties of Company Law by a writer in these pages two years ago.<sup>1</sup> But if these fresh duties are to be cast on the registry of Joint Stock Companies, that office will require to be supplied with a staff capable of discharging them efficiently, and we shall have another instance of the modern tendency of superseding private enterprise by official action. We may regret to see such changes, but they appear to be inevitable, and we must make up our minds to submit to them.

We may add a few words concerning the books before us. They nearly all contain the Act with notes, preceded by an introductory account of it. Mr. F. B. Palmer's book is a sort of supplement to his well-known book of Company Precedents, and it contains a number of carefully drawn forms for use under the Act. It is eminently a book for lawyers. The book by Messrs. Ruegg and Mossop may be described in almost the same words. Mr. Evans' book has the introductory matter enlarged and popularized, so as to be available as a guide book to promoters and directors, with a special chapter of instructions for auditors. Mr. Manson also treats the subject in a popular way, and besides discussing the new Act, he gives instructions for forming a company under the law as now modified. Mr. Simonson's book contains the Act with notes and an introduction. It is printed with admirable clearness. The book by Messrs. Gibson and others is printed on broad

<sup>1</sup> *Law Magazine*, May 1899, p. 271.

pages, containing two columns. In the left-hand column we have the Act, in the right the comments upon it. We notice that the Act is introduced in oblique narration. We think this unfortunate, as it would have been quite as easy and far more satisfactory to give the words pure and simple. At the end of the book we find some useful tables (1) of the new requirements, (2) of the new duties of directors, (3) of the new duties of a secretary, and (4) of solicitors. Mr. Reid's work is a shilling handbook containing the Act with some sections of the prior Acts referred to in it, and an introduction calling attention to the changes effected by it. Messrs. Gore-Browne, and Jordan's book is the twenty-third edition of a well-known work on the subject of companies, introducing the changes rendered necessary by the alteration of the law. Messrs. Waterlow and Risley's book is a similar work, which has now reached its twelfth edition. Doctor Bradley is to be congratulated on the extraordinary sale of his handbook, a sure testimony to its merits—the second edition (and second thousand) being now exhausted, and the third edition will shortly be issued. Mr. Wilkinson's chart is admirably arranged for a bird's-eye view of the special requirements of the Act, and will doubtless find favour with company secretaries and others interested in the promotion and working of public companies.

A. D. TYSEN.

## X.—CURRENT NOTES ON INTERNATIONAL LAW.

### Arbitration.

The record of the past few months illustrates the increasing importance of the principle of International Arbitration as a recognised factor in international politics. The Powers have followed up their ratification of the Hague Convention by the appointment of their representatives on the permanent Bureau of arbitrators; and the selections made, such as those of Lord Pauncefoot, Sir Edward Malet, Sir Edward Fry, and Professor Westlake, by Great Britain, show that the parties to the Convention are taking pains to constitute a body representative of the highest diplomatic, judicial, and juristic eminence and experience. Some of the outstanding international disputes have, it is true, already been settled by special arbitration tribunals: the Swiss Federal Council has adjudicated on the boundary between French Guiana and Brazil; our own Queen has given her award in a similar dispute between Peru and Chili; and President Loubet has delivered his decision in the question pending between Columbia and Costa Rica as to the line of boundary and the possession of adjacent islands in the Pacific and the Atlantic. The question of liability and consequent compensation for the sinking of the *Kowshing* at the beginning of the Chino-Japanese War, so long pending between China and Great Britain, has been referred to the decision of the United States Ambassador to Great Britain; and Baron Lambert, of Belgium, will decide the amount of compensation payable in the Waima affair in West Africa and the loss of Lieutenant Mizon's ship. But there is opportunity for the services of the new permanent tribunal in such questions as those of the Alaska boundary and the French Newfoundland fishery rights, with regard to which there are signs

that the existing *modi vivendi* will not serve much longer. It is only right to expect that in the opening century even more than the closing one, arbitration will be the rule and not the exception; and the field of work before a permanent tribunal which will impartially administer the Law of Nations should be unlimited.

### China.

The situation in China has been simplified by the enunciation made by the Powers as to the attitude they will observe towards each other, and of the demands they make collectively against China. The importance of the agreement between Germany and Great Britain as regards the first of these points is, that it commits the parties to it, and the States which accept its provisions, to upholding the principle of the "open door," or that of equal trading rights for all nations throughout China, which was declared by repeated treaties but had been threatened by the danger of isolated action on the part of single Powers for their own advantage, and to maintaining the territorial integrity of China. But it remains to be seen whether the clause reserving to the two parties, in case of any other Power making use of the complications in China in order to obtain, under any form whatever, territorial advantages for itself, the right to come to a preliminary understanding as to the eventual steps to be taken for the protection of their own interests in China, will be able to prevent infringement of these main principles of policy—*c.g.*, by Russia assuming any control over Manchuria. The terms of the Collective Note cannot be held to exceed the due limits of compensation for the breach of the Law of Nations made by the anti-foreign outbreak in Peking. Capital punishment of the ringleaders of the movement, public expressions of regret for the murder of the German Minister and desecration of churchyards and graves, indemnity for

damage and injury to persons and property, permanent protective forces for the Legations, the provisions that the communications between Pekin and the sea are not to be fortified by the Chinese, nor arms imported into China, and pledges by the Chinese Government to negotiate as to changes in the existing treaties, or as to commerce and navigation, which are considered advantageous by the foreign Governments, as well as other questions concerning the facilitation of commercial relations, are the chief features. These are arrangements which, if carried out, should ensure that the far Eastern question will be treated in the same spirit as the near Eastern one.

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### **The Central American Canal.**

The recent action of the United States Senate with regard to the Hay-Pauncefote Treaty of 1900 (February 5th), on its coming before them for ratification has brought up again the question of the mutual relations of the United States and Great Britain in connection with the proposed inter-oceanic canal through Nicaragua, which gave rise to considerable controversy in 1848-1860. The situation there, prior to the Clayton-Bulwer Treaty of 1850, was that Great Britain had an alliance with and a protectorate over the Mosquito Indians, who were in possession of San Juan de Nicaragua (claimed by Nicaragua) commanding the outlet of the then proposed canal on the Atlantic side, and she also possessed Belize or British Honduras with its dependencies, owing to certain *jura in re*, viz., the right to cut logwood and mahogany there (coupled, it is true, in the treaty between Spain and Great Britain of 1786 with an agreement that the British should evacuate the Mosquito shore and all the continent and make no settlement there), having ripened into rights of settlement and sovereignty *de jure* and *de facto*, Spain having ceased to exercise jurisdiction there, and the United States consul at Belzie being



granted his *exequatur* by the British Crown. On the other hand, successive representatives of the United States in Nicaragua had negotiated conventions between these two countries, giving the former the sole right of constructing an inter-oceanic canal through the territory of the latter, with the right to make fortifications for the defence of the canal though the towns of each end of it were to be free, in return for a guarantee of the sovereignty of Nicaragua throughout its territories : one of which had been disavowed by the United States, but its successor might still have been ratified by them.

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In these circumstances the United States and Great Britain negotiated the Clayton-Bulwer Treaty with a view to prevent any conflict between their respective interests by removing Central America from their future spheres of extension, and to ensure the construction of the proposed canal as a neutral and open highway for the use of all nations. The treaty provided that the canal should be made under the joint auspices and protection of the two nations : that neither should do anything to obtain exclusive control over it by fortifications or otherwise : that neither should occupy, fortify, colonise or assume any dominion over Nicaragua, Costa Rica, Mosquito Coast, or any part of Central America, or make any alliance or connection, or use its influence with any State through whose territory the canal should pass, to secure preponderating rights thereon : that the canal should be neutral in case of war between the two nations : that other nations should be invited to co-operate in the work on these conditions, the design of the treaty being declared to be to construct and maintain the canal as a ship communication between the two oceans for the benefit of mankind, and that the aim of the parties being not only to accomplish a particular object, but also to establish a gen

eral principle, the two nations would protect any other practicable communication by canal or railway across the isthmus, the use of which should be open to all countries willing to protect it. The Treaty contained no renunciation of established rights; and the United States Secretary of State gave a written assurance that "British Honduras and the small islands in the neighbourhood of that settlement which may be known as its dependencies" were excepted from the purview of the Treaty, the British title to them being left to stand on its own footing, and 'Central America' meaning Guatemala, Honduras, San Salvador, Nicaragua, and Costa Rica.

The United States, however, later raised objection to the continuance of the British protectorate of the Mosquitos, and the subsequent making of the Bay Islands into a separate colony (before governed as dependencies of British Honduras) as infractions of the Treaty, and hinted that the British rights in that colony were only strictly *jura in re* and not sovereignty. After considerable correspondence, and the failure to ratify a new Treaty (Dallas-Clarendon, 1856) which should have cleared up these questions, the difficulty was finally removed by Great Britain relinquishing the Mosquito Protectorate in favour of Nicaragua (1859), and ceding the Bay Islands to Honduras (1860), upon which the United States President, in his message to Congress, declared that the difficulties between the two nations had been amicably and honourably adjusted. Previously to these latter Treaties Great Britain had offered to abrogate the Clayton-Bulwer Treaty and arbitrate on the matters in dispute, but the United States had refused to accept it. In 1880 and following years, however, the view already asserted in Mr. Buchanan's despatch to Lord Clarendon in 1854, namely, that the proposed canal should be under American control, was reasserted by

the United States, and the partial or total modification of the Clayton-Bulwer Treaty was demanded by them on various grounds: such as that the neutrality of the canal would give any Power at war with the United States an undue advantage over them, that circumstances had changed with the extension of the Union to California and the Pacific coast, that England's co-operation in the work was only sought in 1850 on the understanding that the canal should be constructed at a reasonably early date with the help of British capital, that the consideration for the Treaty had failed owing to Great Britain having failed to construct the canal, and that she had infringed its provisions by extending the settlement in British Honduras. In connection with this must be taken the fact that in 1889, when M. de Lesseps originated the Panama Canal scheme, the United States Senate resolved that the connection of any European Government with such a canal would be inconsistent with American interests.

More lately still the project of a Nicaragua Canal was revived, and by the Hay-Pauncefote treaty the two nations agreed that such a canal might be made under the auspices of the United States Government, directly or indirectly, which should have all rights incident to such construction, as well as the exclusive right of regulating and managing the canal; but in the desire to maintain the general principle of neutralisation embodied in the former treaty, it was agreed to adopt substantially the regulations adopted for the Suez Canal, and no fortification was to be made commanding the canal or its adjacent waters, but the United States were to have the right of maintaining military police to the extent required for protection against lawlessness and disorder.

The amendments adopted by the Senate are to the effect that none of the restrictions in the treaty is to apply to measures which the United States may find it

necessary to take for securing by its own forces the defence of the United States and the maintenance of public order ; that the Clayton-Bulwer treaty is abrogated; and that the former provision of the Treaty for its being brought to the notice of other Powers and inviting their adherence shall be omitted.

After the acknowledgment by the United States President in 1860, it does not seem likely that it will be contended that the British settlement in Honduras or any other British action there is a breach of the Clayton-Bulwer treaty. The plea of change of circumstances as a reason for a nation's refusal to be bound any longer by a treaty to which it is a signatory was disposed of at the London Conference of 1871 with regard to a similar claim by Russia, which declared that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagement of a treaty or nullify the regulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement." The consent of Great Britain is therefore required for the abrogation of the Clayton-Bulwer treaty; and the amended Hay-Pauncefote treaty goes considerably further than in its original form, in making the neutrality of the Canal and its use by all nations on equal terms, subject to the discretion of the United States Government for the time being.

### **The Conduct of the South African War.**

The official publication of the text of the proclamations issued by Lord Roberts during his direction of the South African war, furnishes a practical commentary on the Hague Convention, by illustrating the military treatment of the inhabitants of countries going through the phases of invasion, occupation and conquest. A few of the chief measures dealing with (1) the status of the inhabitants, and (2) the repression of guerilla warfare, may be

noticed. Upon the army entering the Orange Free State (March) notice is given that persons desisting from hostilities, and found at home and at work, will be protected in person and property; and that requisitions for the necessities of the army will be paid for. Burghers who have not taken prominent part in the policy which led to the war, or commanded any forces of the Republics, or commandeered or used violence to British subjects, and who are willing to lay down arms at once, and take an oath to abstain from any further participation in the war are allowed to go home. In the otherwise similar proclamation issued on the army entering the Transvaal (May 31st), it is notified that private property will be respected as far as compatible with the operations of war if no wanton damage is done to property, in which case not only the authors but all persons who have not done their utmost to prevent it will be punished by confiscation or destruction of their property. On May 24th the Orange Free State was annexed and placed under martial law. On June 6th it was notified that inhabitants of that State (now Colony) found in arms after fourteen days would be liable to be dealt with as rebels; and on September 1st that all persons in that State had become British subjects, except persons attached to commandos prior to the annexation, and continuously since then in arms who will be treated as prisoners of war, and breach of the oath of neutrality was made punishable with death, imprisonment, or fine. On the same date the Transvaal was annexed and placed under martial law, and on September 22nd it was notified that burghers henceforth captured or surrendering will be made prisoners of war; those who voluntarily surrender, except persons taking a prominent military or political part in the war or foreigners, will not be sent out of South Africa, and if not guilty of any other act but fighting, their property is to be treated like that of

non-combatants, and camps will be formed for their reception. All stock of persons on commando or who have broken their oath is to be taken without receipt.

With regard to guerilla measures such as the destruction of property in ways not justified by the usages of civilised warfare, on March 26th notice was given that any wanton destruction in the territories of the Republics of public or private property will render its authors liable in person and property. On June 16th it is intimated that as a penalty for such acts, the inhabitants of the districts where they take place will be held responsible as aiders and abettors: houses or farms in the vicinity will be burnt, and the principal civil residents made prisoners, a fine levied on every farm, receipts for requisitions cancelled and no payments made. Breach of the oath of neutrality is made punishable with death, imprisonment, or fine. Buildings or farms in which scouts or forces of the enemy are harboured may be razed to the ground. The failure by persons to acquaint the British forces with the fact of the enemy's presence on their farms is declared to be aiding and abetting the enemy (August 14th). In cases of sniping, all stocks and supplies of snipers are to be taken without receipt. The burghers are informed that as soon as their leaders submit, and when every cannon has been surrendered, peace will be declared, and prisoners of war sent home, except in the case of members of the late Republican Governments who are responsible for the disastrous prolongation of the war, and persons shown to be guilty of acts contrary to the customs of war (September 28th). A proclamation of November 18th permits the burning of farms only in case of their use for treacherous or hostile purposes, or of the telegraph or railway lines being broken, or where used as bases of operation for raids, and then only with the direct written consent of the Commander-in-Chief.

**Domicile.**

The following recent cases are of interest in this connection. In *Barretto v. Young*, where a testator, who died in 1824, had bequeathed property upon trust to go as his daughters should appoint by will executed and attested by two or more credible witnesses, and a daughter who was a domiciled Frenchwoman made a disposition by will in the French language which was unattested, but was good according to French law; it was held that it was not enough that the will executing the power given by the will should satisfy the law of the person's domicile, if it did not satisfy the terms of the will. In *Pepin v. Bryce* the Court decided that the beneficial interest in leasehold property in England did not pass under the will of a person having a foreign domicile which was executed according to the law of the domicile but was not in accordance with the *lex situs*, leasehold property for the purposes of international law being real property. In *De Wilton v. Montefiore* an interesting point (really dependent on municipal law) came up for decision, namely, whether two persons belonging to the Jewish faith and standing in degrees of relationship in which it was lawful by that faith to marry (niece and maternal uncle) who are domiciled in England could make a valid marriage according to English law: and it was decided that they could not, the personal capacity to contract marriage being determined whatever the creed of the parties by the law of the domicile; the English municipal law which allows the validity of marriages of Quakers and Jews, solemnised according to the usages of those denominations, being held only to relate to matters of form and not to capacity.

G. G. PHILLIMORE.

## XI.—NOTES ON RECENT CASES (ENGLISH).

In *Whyler v. Bingham Rural District Council* (110 L.T. 89) a widow claimed damages under the Fatal Accidents Act (9 & 10 Vict. c. 93) for the death of her husband caused by the wrongful act, neglect, or default of the defendants, the Rural District Council. The deceased had driven a carriage at night along a road under the jurisdiction of the defendants, they being the Highway Authority. Alongside a part of the road was an old watercourse which the predecessors of the defendants had closed to passengers by a fence. The defendants finding the fence in bad repair ordered it to be removed, and a small portion of it only to be restored. The want of the fence caused the death of the husband, who drove into the watercourse at night. The jury found a verdict for the plaintiff. The defendants appealed on the ground that there was no evidence upon which they could be found guilty. The Court of Appeal (Smith M.R., Collins and Stirling, L.JJ.) held that there was evidence that the defendants had been guilty of misfeasance which caused the death. Nuisances arising from negligence frequently cause direct injury to the person; for example if, in the course of necessary excavations, a heap of stones is negligently left lying on the public road, a person falling over such stones and being thereby injured has a right of action in respect of the misfeasance, and so it was held in *Ellis v. The Sheffield Gas Consumers Co.* (2 Ell. and Bl. 767), where the company was held responsible for the wrongful act of their contractor, a third person having sustained damage by falling over the excavated stones. The Court of Appeal, however, in *Cowley v. Newmarket Local Board*, decided that where an owner of land, adjoining a highway, in making an approach to his land without the sanction of the Local Board, made a drop in the level of the highway and left it in a dangerous condition, where-



by a person fell down the drop and was injured, the Local Board were not chargeable with non-feasance, although they might have been chargeable with malfeasance had the circumstances justified it. This decision was affirmed by the House of Lords ([1892] A.C. 345).

In the newly-reported case of *Whyler v. Bingham Rural District Council* we have the counter-part to *Cowley v. Newmarket Local Board*, and a road Authority found liable for injury through non-repair. It is a good example of the difference between non-feasance and mal-feasance.

Section 11 of the Wills Act (7 Will. IV. & 1 Vict. c. 26) provides that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of that Act. A private belonging to the Sussex Volunteers volunteered for South Africa. On February 3rd, 1900, he passed the medical examination, and was accepted. On February 19th he went into barracks, and, with the exception of one or two short intervals on leave, continued to reside there until he left England. On March 2nd the order to sail arrived; on March 8th he made his will, being then an infant; and on March 10th he sailed for South Africa. The President of the Probate Court (Sir F. H. Jeune) held that the testator had done something under his orders to proceed to the front, and was therefore at the time the will was executed *in expeditione*, or "on actual military service." The will was therefore admitted to Probate, the testator having died on the field of battle. (*In the Goods of Hiscock*, 35 L.J.R. 667). This decision is interesting, the interpretation of the above section 11 having hitherto been very limited. It appears from the preface to the life of Sir Leoline Jenkins, that he claimed to himself some merit for having during the preparation of the Statute of Frauds obtained for the soldiers

of the English army the full benefit of the testamentary privileges of the Roman army. It is, therefore, clear that the principle of the exception was borrowed from the Civil Law. It would take up too much space to enter into a discussion on the different points on which commentators on the Roman Law have differed on this subject; but they all agree in this one particular, viz. :—that it was not every soldier, under every circumstance, who was entitled to the privilege of the *testamentum militare*, but it was confined to those who were *expeditionibus occupati*. Whether *expeditio* was constituted until the soldier had returned home, or whether it ceased when he went into winter quarters or garrison, is not certain. In its origin, however, the testamentary privilege extended to all soldiers; we have it so in the 29th Book of the Digest, entitled *De testamento militis* which begins by stating that a full and free power of making a will was first granted to Julius Cæsar, and this was the origin of the privilege of soldiers. The most noted cases determined in our English Courts have been: *In the Goods of Donaldson* (2 Curt. 386) in 1840, *Drummond v. Parish* (3 Curt. 522) in 1843, and *Boeles v. Jackson* (1 Spinks Ecc. and Ad. 294) in 1854.

A most important decision of the Court of Appeal (*In re Whitaker*; *Whitaker v. Palmer*, 110 L.T. 64) consisting of Rigby, Williams and Romer, L.JJ., settles a question which for the last quarter of a century had been in doubt, viz., in what order in the administration of an insolvent estate in the Chancery Division are voluntary creditors to be paid? The Court held that the rule in Bankruptcy on this point was introduced into the administration of insolvent estates by the Judicature Act 1875, section 10; and therefore voluntary creditors rank *pari passu* with creditors for value, according to s. 40 of the Bankruptcy Act, 1883

(46 & 47 Vict. c. 52). This overrules *In re Maggi* (20 Ch. D. 545). There Fry, J., in 1882, had to consider whether a creditor, who had recovered judgment against the executors as such, was entitled to be paid in priority to other creditors, and he held that s. 10 did not take away the priority of the judgment creditor. He appears to have considered that the question was whether by force of s. 10 the provisions of s. 32 of the Bankruptcy Act 1883 prevailed, and whether, with the exceptions mentioned in it, all debts should be paid *pari passu*. He came to the conclusion that the narrower construction must be given to s. 10, and that it related only to the rights of secured as against unsecured creditors, considered as two conflicting classes, but that it did not affect the rights of members of each of the two classes *inter se*. He relied on *Lee v. Nuttall* (12 Ch. D. 61). The true effect of s. 10 was subsequently considered by the Court of Appeal in *In re Leng* ([1895] 1 Ch. 652) and by, Stirling, J. in *In re Heywood* ([1897] 2 Ch. 593); while this recent case of *In re Whitaker* conclusively settles the practice. The old rule of the Court of Chancery, by which voluntary debts were postponed, must be regarded as abrogated by s. 10 of the Judicature Act 1875. All existing text books on the subject will now require to be amended.

A curious question of costs arose in *Solomon v. Mulliner* (110 L.T. 111). The plaintiff had deposited a motor car with the defendant Mulliner for safety. The latter parted with the possession of the car to the Motor Carriage Supply Company, Limited. The plaintiff thereupon brought an action against the defendant Mulliner and the defendant company, jointly and severally, claiming the return of the car, or its value, and damages for its conversion. The defendant company admitted its liability for £340, and the

plaintiff took that sum out of court. The defendant Mulliner paid £2 into Court and denied his liability. The plaintiff, under Order XXII. R. 7, accepted the £2 in satisfaction of his claim against the defendant Mulliner, and served him with a notice of discontinuance. The plaintiff then carried in his bill of costs against the defendant Mulliner for taxation. The Master refused to tax it on the ground that under section 116 of the County Court Act 1888 (51 & 52 Vict. c. 43) the plaintiff was not entitled to any costs against the defendant Mulliner. The plaintiff then appealed to a judge at chambers, and asked for an order that his costs should be taxed on the High Court scale, on the ground that the action could not have been brought in the County Court, or else for a certificate under the latter part of s. 116 that there was sufficient reason for bringing the action in the High Court, but the learned judge refused to make the order. On appeal to the Court of Appeal, Smith, M. R., and Collins, L. J., held that the question whether or not an action in the High Court "could have been commenced in a County Court" within s. 116, depends not on the amount claimed in the writ, but on the adjudication in the cause. Then as the plaintiff had only recovered £2 from the defendant Mulliner, he was not entitled to any costs in the action. In *Goldhill v. Clarke* (68 L. T. R. 414), tried before Charles, J., in 1892, the learned judge held that in an action for a sum over £50, which could not have been commenced in a County Court, s. 116 did not apply to deprive the plaintiff of his costs, as the words in that section "action which could have been commenced in a County Court" govern the whole section. This decision of Charles, J., is now over-ruled by the above case. The matter was also touched on in *Chatfield v. Sedgwick* (4 C. P. Div. 459), and to a minor extent in *Lovejoy v. Cole* (71 L. T. R. 374).

Another point on taxation of costs was decided in *In Re Wellborne* (110, L. T. 136) where on a motion to discharge an order made in chambers for taxation of a solicitor's bill of costs, on the application of one of two beneficiaries under a will, more than twelve months after the bill had been paid by a trustee, Kekewick, J., refused the motion, being of opinion that the discretion given to the Court by section 39 of the Solicitors Act, 1843, to order taxation was absolute, and was not fettered by the proviso in section 41 that the application for taxation should be made within twelve months after payment. The Court of Appeal (Lord Alverstone, L. C. J., Rigby and Williams, L.JJ.) reversed this decision. In this they followed the practice and course of decisions established by the case of *In Re Downes* (5 Beav. 425). That case which was decided in 1844, by Lord Langdale, determines (*inter alia*) that when a solicitor's bill had been paid by a trustee, the *cestui que trust* cannot, after the expiration of twelve months from payment, obtain a taxation as against the solicitor, although he had no notice of the payment until after the twelve months had expired. It may be thought that there may be some hardship on third parties, who are thus only enabled to tax the bills within a limited time, and who also may have had no notice of the payment until too late. Such cases, doubtless do arise, and in them the Statute does not give so much benefit as might be desired. Before the Act came into operation the *cestui que trust*, out of whose estate a solicitor's bill was to be paid, could not procure the bill to be taxed as against the solicitor directly, but he might impeach any improper or extravagant payment made by his trustee in discharge of the solicitor's bill, and might, as against the trustee, cause the solicitor's bill to be taxed. Under the Act, every remedy which the *cestui que trust* had against the trustee remains to him, and besides that, he is entitled to ask for

taxation against the solicitor directly, at any time before payment of the bill, or within twelve calendar months after payment.

Two further points have been determined, which tend to elucidate the Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39). One is in *Snape v. Snape* (110 L.T. 65) which shows that s. 4 of that Act is far more elastic than was popularly supposed. A husband and wife separated and lived in different houses for several years, the husband paying nothing towards the wife's maintenance. There was evidence that within the previous period of six months, before the issue of the summons, the husband slept at the house of his wife, and afterwards had returned to his own house. Three weeks before the issue of the summons, the wife went to the husband's house, but was repelled. She then took out a summons under the above s. 4, on the ground that he had been guilty of "wilful neglect to provide reasonable maintenance for her," and had by such neglect "caused her to leave, and live separately and apart from him." The justices made an order against the husband, which was confirmed on appeal by the Probate, Divorce and Admiralty Division (Sir F. Jeune and Barnes, J.) on the ground that there was intermittent cohabitation within six months of the order. The period of six months is not mentioned in the above Act; but in s. 8 it enacts that "all applications under this Act shall be made in accordance with the Summary Jurisdiction Acts." Section 11 of the Summary Jurisdiction Act, 1848, which provides the six months' limit, is thereby incorporated. The other point was in *Cobb v. Cobb* (69 J.P. 125) where the Probate Divorce and Admiralty Division (Sir F. Jeune and Barnes, J.) determined, on appeal, that the justices, in making an allowance to a wife for maintenance under the above s. 4, where they also made an order for separation, and there were no children, ought to follow the practice of the Divorce Court in suits for judicial separation where there are no children, viz.—allow the wife one third of the joint income.

SHERSTON BAKER.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Lord Monboddo and some of his Contemporaries.* By WILLIAM KNIGHT, LL.D., Professor of Philosophy in the University of St. Andrews. London: JOHN MURRAY, 1900.

Many lawyers would like to read a fuller account than is given by the Biographical Dictionary of a judge, who occupied a seat on the bench for no less a period than 32 years, and obtained a reputation as a jurist, extending far beyond the limits of his own country. But those who expect to find such an account, in the book now under review, will be disappointed. We are indeed given a short account of the celebrated Douglas case, in which Mr. Burnett was employed as counsel, and by which he established his reputation as an advocate and a lawyer; but the account is obviously inaccurate, as it states that Burnett was raised to the Bench as a lord of Session in 1764 (the date given in other works is 1767), and that the Douglas case was decided in the Scotch Courts in 1767. Of his work as a judge, we are only told that "he often differed from his colleagues on the bench, but none of his judgments was ever reversed in the House of Lords. If they happened to be opposed to the views of the majority of the Scottish Bench, they were invariably sustained on appeal by the English Judges." This statement is quite sufficient to justify the reputation he had as a judge, but it is, it must be confessed somewhat meagre.

The book has not been written by a lawyer for lawyers; but by a professor of philosophy, to call attention to the distinction which the judge had attained in the world of science and letters. It is to his ultra-professional pursuits that his fame is due. He was, before he was raised to the Bench, a painstaking reporter and a successful advocate; but his fame would never have spread beyond the narrow circle of his profession if he had been nothing more. He was, both before his promotion and still more afterwards, an original thinker, learned in the wisdom of the ancients, and given to use his learning in following out inquiries into subjects about which most of his contemporaries troubled themselves not at all. Modern research has in many instances verified assertions hazarded by Lord Monboddo, at which his contemporaries scoffed as visionary and absurd. In his lifetime he was

the centre of a distinguished literary circle, and the friend of the most noteworthy men of his day. It is this side of his character which is chiefly brought out by Dr. Knight. He has had access to many papers and letters preserved by the Burnett family, and hitherto unpublished. They are set out at length in the book, and speak for themselves. Those who are anxious to find out what was known and thought on abstruse subjects by advanced thinkers more than 100 years ago, will find interesting material for study in these letters. Dr. Knight has given a short chapter pointing out the positions of the persons with whom Lord Monboddo corresponded. This increases the interest of the book; but its claims on the public depend mainly on the fact of its presenting letters hitherto inaccessible.

*International Law in South Africa.* By T. BATY. London: Stevens and Haynes. 1900.

This little volume contains some lectures delivered by Mr. Baty at Oxford, and treats of subjects which have been much discussed during the last two years. The longest and most important chapter is entitled, "Contraband for Neutral Ports," and Mr. Baty judiciously commences by impressing on his readers the importance of not confusing the penalties which apply to "contraband," with those that apply to blockade and capture of enemy's property. "Contraband goods" are defined as "goods which are in direct transit to the enemy," and, as to the accuracy of this definition there does not seem to be much dispute; but the real difference of opinion arises over the meaning of the term *direct transit*. One rule is, that the ship must be going to a hostile port; the other, that the goods must be going to the enemy. Mr. Baty is a strong supporter of the first, which he calls the *objective* view, and examines the cases with great care, in order to establish that this has always, till recently, been the accepted view, and he also points out the practical difficulties in the way of the second or subjective view. We think he has been more successful in the former attempt than the latter. Mr. Baty would indeed carry his principles still further, and exempt from capture even munitions of war on their way to a belligerent, if conveyed by a neutral. We find it difficult to carry sympathy with the interests of commerce so far, and must incline to consider the term of "a *neutral merchant*" altogether misleading under such conditions. As may be expected from these views the learned author considers this country entirely in the wrong in



the cases of the *Herzog* and *Bundesrath*. We are also pronounced to have been in the wrong in moving our troops across Portuguese territory, which point is discussed in the Chapter entitled, "Passage of Troops over Neutral Territory." The question of the international status of the South African Republic is considered in some detail, and, contrary to the criticisms of Dr. Stubbs, as republished in the last number of this Magazine, Mr. Baty comes to the conclusion that the Republic was a *mi-souverain* state, although it is not quite clear what are the practical consequences of that status. There are other interesting discussions, and it is well worth the reader's while to examine the Comparative Summary of the Transvaal Conventions, with which Mr. Baty concludes his instructive little work.

#### NEW EDITIONS.

Second Edition. *The Institutes of Roman Law*. By RUDOLF SOHM. Translated by J. C. Ledlie, B.C.L., M.A. With an Introduction by E. Grueber, M.A. Oxford: At the Clarendon Press. London and New York: Henry Frowde. 1900.

This text-book of the history and system of Roman private law compiled by Professor Sohm, of the University of Leipzig, has received careful treatment in the hands of the translator, this edition being based on the eighth and ninth German editions, published last year, and containing practically all the alterations of the seventh edition, which were due to the passing of the German Civil Code. What these alterations and additions consist of Professor Grueber tells us in his interesting introduction, and there are many references to and extracts from the Code throughout the book. The translator has endeavoured to produce a faithful translation of Professor Sohm's treatise, and in this we think he has been successful.

Second Edition. *The Lands Clauses Acts with Decisions, Forms, and Bills of Costs*. By ARTHUR JEPSON. This edition by John M. Lightwood, M.A. London: Stevens and Son. 1900.

We suppose that there are few statutes under whose provisions larger sums of money have changed hands than the Lands Clauses Acts. The principal statute is more than half a century old, and its importance has been ever increasing since the time when it first received the assent of the then youthful Queen Victoria. And

cases explaining or illustrating it have been decided continuously by various Courts of Law. So recently as April last the Judicial Committee of the Privy Council had before them an important case—*Falkingham v. the Victorian Railway Commissioners* ([1900] App. Cas. 452)—which the present editor rightly cites as an illustration of section 37. The work is altogether an important one for practical purposes, and no pains have been spared upon this edition.

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Second Edition. *Bills of Costs*. By HORACE MAXWELL JOHNSON.  
London: Stevens and Sons. Sweet and Maxwell. 1901.

"So it comes to this, it is merely a matter of costs." Such is the sad termination of many a consultation. The lawyer must take the world as he finds it: and must study the relevant law accordingly.

We suppose that it must be seldom that a book by a new author, of the size and price of Mr. Maxwell Johnson's treatise on Bills of Costs, arrives so speedily at the dignity of a second edition, as this work first produced by him in 1897. That the book supplies a real demand is proved by this fact alone. It is comprehensive and careful, and now it has been brought up-to-date.

We desire to direct particular attention to Chapter XVI. entitled "Costs in the County Court," the special work (as we learn by the preface) of Mr. T. Kemmis Bros, Registrar of the Southwark County Court. If these words should meet the eye of any young practitioner, whose practice consists mainly of occasional cases in the County Court, which he hopes will be the forerunners of more important business, and who is meditating how to fill up his unemployed time, let us advise him to read pages 803 to 863 of Johnson on Costs. It may be a dull study; but let him have all the matter of those pages at his fingers' ends, and he may often save an odd pound or two for his clients. Let him realise what the difference is between the different scales, and the reasons which determine which is the proper one to apply, and he will often remember the hours spent in assimilating this knowledge with gratitude. Fighting a case, or settling a case, or making or resisting the application for costs at the end of the day—over and over again it will be of much importance to his clients if he is as familiar with the matter of these pages as the Judge or Registrar and more familiar with it than the representative of the other side. The studies of the

practical advocate do not always lie in the same direction as those of the academical student of jurisprudence.

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Third Edition. *The Devolution of Real Estate and Administration of Assets.* By the late L. J. G. ROBBINS and F. TRENTHAM MAW. London: Butterworth. 1901.

Many new works and new editions of old works have made their appearance recently with the object of explaining the changes which have been effected in the law by the Land Transfer Act, 1897 (Statute 60 & 61 Vict. c. 65.) The present edition of the well-known work of Mr. L. J. G. Robbins—an edition carried out upon lines which were suggested by that learned lawyer shortly before his death—has its origin from the same cause. The alterations in the Law of England which were introduced by the first part of the statute to which we have referred were quite sufficiently sweeping to call for a “logical arrangement of the whole subject in one volume,” such as the editor here claims to have given us. The first edition was published in 1898, when the Act was new; and the scope of the work has been greatly increased in the present edition. On page 7 we read that “what the Act does is to enact that (with certain exceptions) . . . the real estate of a person dying on or after January 1st, 1898, shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him.” It is not too much to say that the change effected by this enactment is a revolution in the Law of Real Property. Old precedents of wills, and of many descriptions of conveyances, which have long given satisfaction in the offices of solicitors, must now be carefully revised. The advice to be given to that once absolute “monarch of all he surveyed,” the heir-at-law, must now be diligently considered in the light of the new Law. It is not enough to read the Act itself: its application to previously existing Law is also matter to ponder. We recommend the reader to study with these ends in view the pages which lie before us. That the policy of the Act itself has been sedulously considered, and that the work is no mere collection of statutes and cases will be apparent from such passages as the following:—“There is nothing,” as is submitted on page 128, “to warrant the assumption that the Legislature intended, by implication, to

confer any legal remedy upon creditors in respect of real assets resting under the Act in the personal representation, in addition to the equitable remedy already recognised by Courts of Equity or conferred by statutes; but assets which prior to the Act were equitable, will remain of the same nature, and be distributable accordingly, notwithstanding that they are now rendered immediately available in the hands of the personal representation for payment of debts."

Such a sentence as that states a principle. We believe that it is a correct principle; but whether it be so or no, the citation will serve to shew the nature of the treatise now under review, and the kind of assistance which it is likely to render to the thinking lawyer. At the same time, all the necessary work of research and codification required for bringing the book up to date seems to have been adequately performed.

Sixth Edition. *The Student's Conveyancy*. By ALBERT GIBSON AND WALTER GRAY HART, LL.B., London: Law Notes Publishing Offices, 1900.

The main point of difference between the present edition of this work, which is intended for the use of candidates at the final and honours examination of the Incorporated Law Society, and its predecessors is once again the Land Transfer Act, 1897 (Statute 60 & 61, Vict. c. 65), which, with its rules, has been the cause of so many new editions of legal treatises. It is certainly important that students should begin at once to include some idea of its provisions in their earliest notions of the art and science of conveyancing. On page 555 of the edition before us, and the following pages, students will find a lucid history of the short facts relating to the subject and a very satisfactory explanation of the present system of registration of land. And in all other ways the volume seems to have been thoroughly brought up-to-date.

Seventh Edition. *A Digest of the Law of Partnership with an Appendix of Forms*. BY SIR FREDERICK POLLOCK, BART., London: Stevens and Sons, 1900.

Sir Frederick Pollock's book is a standard classic in the Law Library. The author himself originally drafted the Bill, which subsequently became the Partnership Act, 1890. He has since brought his treatise up-to-date from time to time, and it is hardly necessary to observe that what he has done, he has done well

Considering the moderate price of the volume, it can scarcely fail to continue running through a series of editions. The conveyancer ought certainly to have before him the precedents, which appear at the end of the book, when drafting a commercial deed of partnership.

### THE YEARLY LEGAL PRACTICES.

*The Yearly Practice of the Supreme Court*, 1901. By M. Muir Mackenzie, S. G. Lushington, J. C. Fox and others.

*The Yearly County Court Practice*, 1901. By G. Pitt-Lewis, Q.C., Sir C. Arnold White, and others. London: Butterworth and Co. 2 Vols.

*The Annual County Court Practice*, 1901. By W. C. Smyly, Q.C., and W. J. Brooks. London: Sweet and Maxwell; Stevens and Sons. 2 Vols.

These yearly publications, so indispensable to the busy practitioner and so uninteresting to those outside the ranks of lawyers, are again to hand, and a casual inspection is sufficient to show that the accustomed care and skill has been bestowed upon their contents to make them as useful and reliable as it is possible to do for those for whose use they are intended. It is gratifying to note that the labours of the editors of the *Supreme Court Practice* have met with such encouraging appreciation by the profession that we have now the third yearly issue and we may safely predict that this work has come to stay. The editors draw attention to some alterations in the arrangement of the book, such as inserting the consecutive numbers of the rules as well as the orders in which the rules are included, which will add to its handiness.

The editors of the *Yearly County Court Practice* were fortunate on the eve of going to press in obtaining the important new rules which came into force on January 1st, and these have been inserted in their proper places and carefully annotated. All the latest decisions have been carefully noted, and the Admiralty Practice contained in Vol. II. has again been the subject of special attention. We may safely assume that in the experienced hands of Mr. Pitt-Lewis, who is very much at home in trying Admiralty cases in the City of London Court, this portion is as nearly perfect as may be.

Mr. Smyly's work bears evidence of careful and discriminating labours, in which he has had the valuable assistance of Mr. W.

J. Brooks. Several important statutes passed during the last session of Parliament—the Agricultural Holdings Act, Workmen's Compensation Act, and the Money Lenders' Act—have all received special notice; and the decisions of the House of Lords, and Court of Appeal, on the Workmen's Compensation Act, 1897, have been carefully noted. Cases dealing with questions of practice have been incorporated with the practice, whilst those which decide questions of principle have been set out at the end of the part which deals with the practice. We endorse in its entirety the learned editor's statement in the dedication to the Speaker that he "has the respect and good wishes of every member of the Bar," but is not the dedication of a book of this description—however valuable its contents—carrying sentiment a little too far?

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*Statutes of Practical Utility*, 1900. By J. M. Lely, M.A. London: Sweet and Maxwell; Stevens and Sons.

*The Practical Statutes*, 1900. By J. S. Cotton. London: Horace Cox.

The most interesting and not the least useful portion of Mr. Lely's book is the summary, in which he briefly gives the effect of each statute printed. His observations at the conclusion of this section are significant and well worthy the attention of our legislators, especially that portion dealing with the improvement of legislation. He makes two important suggestions in the way of reform, the first, as he says, a small and easy one, the second great and difficult. The citation of statutes, he thinks, instead of being by regnal year and chapter should, as in the Colonies, be by number and the year of our Lord. The new century offers a convenient opportunity for making the change. Again Parliament might conveniently in many if not in all cases "proceed," as the late Lord Beaconsfield once expressed it, by way of resolution and not by way of bill. That is to say, the substance of a bill might be voted by a set of resolutions in plain and easy terms and the legal result of these resolutions might afterwards be put into technical language by experts, whose renderings should not become law until after a considerable time had been given for Parliament to detect deviations from the resolution. No doubt much can be said in support of these suggestions, and much may be said against them, but, as Mr. Lely apparently has a free entry to the

pages of the *Times*, he would be doing a public service by keeping his views before the public until some decision is come to in the matter, one way or the other. The arrangement of this book is in alphabetical order, in continuation of *Chitty's Statutes*, with notes and the aforementioned summary.

Mr. Cotton's book is handy in size and arrangement for reference, and contains introductions to the statutes; notes; tables of statutes repealed and subjects altered; lists of local, personal, and private acts, together with a copious index.

### CONTEMPORARY FOREIGN LITERATURE.

*Bidrag till Lärnan om Aftal särskildt mellan Frånvarande. En Komparativ Rättstudie.* By C. A. REUTERSKIÖLD. Upsala, 1900.

This is one of the excellent series of legal monographs published by the University of Upsala. They deal with Roman, Swedish, and International Law, and give the English reader a high opinion of the juristic capacities of the Swedes. For the benefit of readers unacquainted with the Swedish language it may be stated that the title means "A contribution to the learning on Agreement, especially between absent parties." The author begins with the subject from the point of view of jurisprudence, follows it through Roman law (where it is to be found mostly in Digest ii., 14, and xlv., 7), and traces the variety of the law in the most important systems. Numerous English, American, and Indian statutes, text-books, and decisions are cited. A competent knowledge of English law is shown, and in the bibliography of authorities the best English text-books in their most recent editions are included. The only matter in which the author is perhaps a little at sea is in that which must always be a difficulty to a Continental jurist, the peculiarly English distinction between a contract under seal and a contract in writing.

*Grenzen der Rechtskraft.* By DR. ALBRECHT MENDELSSOHN BARTHOLDY. Leipzig, 1900.

This interesting treatise, by one who bears an honourable name, is an attempt to show, from an examination of the legal systems of England, the United States, France and Germany, the limits within which the judgment of a Court of Justice operates on others than the parties. The scope of the work may be judged by the heads of the chapter on English-American law. They run

thus: History, Estoppel and Merger, Parties and Privies, Companies and Shareholders, Regress, Guarantee and Attachment, Judgment *in rem*, Collateral Attack. The last is a mode of procedure somewhat strange to English lawyers, but much used in the United States. It is a kind of action to set aside a judgment and lies where the Court has improperly assumed jurisdiction, or where the judgment has been obtained by fraud or collusion. (*Silensparker v. Sidensparker*, [1864], 52 Maine, 481). This case with many others is set out in an appendix of the leading cases in England and the United States. The learned author, unlike most foreign jurists, is quite at home in dealing with English decisions, and knows how to cite English reports. The only error that a diligent reviewer has been able to find is at p. 524, where *Brinsmead v. Harrison* is said to have been decided in the "Exchequer Chamber of the Court of Common Pleas." The meaning is obvious, but it is hardly a correct mode of conveying it.

#### SOME WORKS OF REFERENCE.

*The Lawyer's Companion and Diary*, 1901. Edited by F. LAMMAN, B.A. London. Stevens & Sons.—The present issue maintains the usual high standard of this publication. All the recent judicial appointments and promotions have been noted, and the lists of Counsel and Solicitors have been brought up to date. A diary for every day of the year, Tables of Costs, Stamp Duties, and a list of the Public Statutes of 1900, are some of the many useful features of this work.

*Hazell's Annual for 1901*. Edited by W. PALMER, B.A. (16th year). London. Hazell, Watson, and Viney. This well-known Annual is a complete record of men and topics of the day; and is what might be called an interesting and readable book of reference. Every subject of public interest is dealt with in its pages. The Wars in South Africa and China, the Commonwealth of Australia Act, Army Reform, the General Election, and the Powers and Constitution of the New Borough Councils in London are some of the many subjects treated in the work. The Ministerial changes are all recorded, and biographies are given of many of the leading men of the day. Maps are included of places prominently before the public, but the one of South Africa, mentioned in the Key to Contents, we are unable to find in the body of the work. The present issue has been revised right up to date, and to anyone taking an interest in public affairs the book cannot fail to be of the greatest possible service.

*The Royal Blue Book: Court and Parliamentary Guide*, 1901. London. Kelly's Directories.—The present is the 158th edition of this invaluable publication. Though old in years, the work is kept thoroughly up-to-date in every way. So far as we can see, there is no change in the general features of the work, and, indeed, it would be difficult to improve on the present method of compilation. In addition to a complete directory of the better class private residents in the district



comprised in that area which is bounded by Hampstead on the north, Chelsea on the South, Finsbury on the east, and Hammersmith on the West, there is much valuable information respecting the Royal Family and Household, Public Departments, and so forth.

\* *Herbert Fry's Royal Guide to the London Charities.* Edited by JOHN LANE (37th Annual Edition). London: Chatto & Windus.—This is a useful Annual, and should be in the hands of all persons who have money to give or leave to charities. The objects of the work are two-fold first, to point out to the suffering the Charities or Institutions to which it will be best for them to apply, in the hope of getting the relief their need requires; and secondly, to help those benevolent people who have money to give but are in doubt where to give it. The work gives in alphabetical order, a complete list of the London Charities, with the date of their foundation, addresses, annual income, and other particulars. The editor's preface is both useful and interesting.

Received too late for notice in this issue:—*Les Territoires Africains*, By E. Rouard de Card; Thwaites' *Students' Constitutional Law and Legal History*; *Whitaker's Almanack*, 1901; Edalzi's *Railway Law for the Man in the Train*.

The following Reviews have been held over owing to want of space:—Raikes' *Maritime Codes of Italy*; Minton-Senhouse's *Case Law of Workmen's Compensation*; *Lawyers and their Clients*; Duckworth's *Trader's Guide to the Law of Sale of Goods*; *Every Man's Own Lawyer*; Ruegg's *Employer's Liability Act*; Vol. I. *The English Reports*; *Index to the Law Times Reports*; *Beverley Town Documents*; Selden Society; Duckworth's *General and Particular Average*; *Charter Parties and Bills of Lading*.

Other publications received: *The Monthly Review*; *Bentham and the Codifiers*, By Charles N. Gregory (Virginia State Bar Association); Macpherson's *British Enactments in Native States* (Superintendent of Government Printing, Calcutta); *Subject List of Works on the Laws of Industrial Property* (Patent Office Library); Druce's *Agricultural Holdings Act*; Bulletin, No. 54 of the New York State Library.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *North American Review*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathavar Law Reports*, *The Lawyer* (India), *Cape Law Journal*, *Yale Law Journal*, *New Jersey Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

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No. CCCXX.—MAY. 1901.

## I.—THE WORKING OF THE PATENT ACTS.

THE Committee on Patent Law appointed by the Board of Trade was presided over by the Right Hon. Sir Edward Fry, and consisted of the Master of the Rolls (Lord Alverstone), the Solicitor General (Sir E. Carson, K.C., M.P.), Sir Wm. Houldsworth, Bart., M.P., F. J. S. Hopwood, C.B., C.M.G.<sup>1</sup> (Board of Trade), S. E. Spring Rice, C.B. (Treasury), Fletcher Moulton, K.C., M.P., Colonel Thomas W. Harding, Edward Carpmael, Herbert Hughes, and Arthur Paget (Secretary.)

These names show that the Board of Trade have done all in their power to secure an efficient Committee. Sir Richard Webster, to use the name by which Lord Alverstone is more familiarly known, and Mr. Fletcher Moulton have had more experience in the conduct of patent cases than any other lawyers since the patent laws have been in existence so that the claims of the Bar would not be likely to be lightly overlooked. The Board of Trade were represented by Mr. Hopwood, who has made a special study of the patent laws in this country and visited the United States' Patent Office at Washington, and the Canadian Patent Office at Ottawa. The notes of this visit in 1898 are a valuable contribution to the materials before the Committee and suggest that the Board of Trade would do well to ask Mr. Hopwood to report on the working of

the German Patent Offices before any further legislation is undertaken. Mr. S. E. Spring Rice, in representing the Treasury, has certainly taken care, as he would be expected to do, that no recommendations likely to result in a diminution in the revenue payable to the Treasury should be made by the Committee. Mr. Edward Carpmael was chosen from among the Patent Agents and he as well as the remaining members of the Committee have shown a thorough knowledge of the subjects which have been selected for investigation. The Committee were fortunate in securing the services of Mr. Arthur Paget as Secretary and apart from the special acknowledgment in the report, the appendices, correspondence and index shew that he must have been a great help to the Committee.

This excellent Committee was presided over by a most experienced lawyer whose physical and intellectual vigour made it difficult for those who appeared before him to understand his reason for retiring from the Court of Appeal in the middle of a useful and active career. For inquiries of this nature and others of a more important character, the country should be thankful to have a man of such distinguished ability held in reserve.

It is to be regretted that the Solicitor General, through indisposition, has not signed the report and that no note of his views is appended. If any such note had appeared, I think one is entitled to assume from the questions put by him to the witnesses that it would have shewn a disagreement with the main conclusions at which the Committee arrived.

The Board of Trade defined the duties of the Committee by confining the scope of the enquiry to three heads, the first dealing with a partial examination as to the novelty of inventions, although any general system of examinations as to novelty was barred; the second having reference to

the amendment of the law relating to the grant of compulsory licences, and the third to the extension of time for application by foreign inventors under the International Convention.

It will be seen that, although the scope of the enquiry was thus limited, the consideration of important questions as to the administration of the patent laws arose under the first two heads. From the constitution of the Committee it is apparent that within its own body a vast amount of knowledge was in the possession of the Committee without extraneous evidence, but this was supplemented by the evidence of twenty representative witnesses who appeared before the Committee, so that whatever the result of the enquiry and whatever opinions may be contained in the report it cannot be said that the Committee had not sufficient evidence and other material before it upon which to come to a right decision.

#### PARTIAL EXAMINATION AS TO NOVELTY.

In order that it may not be said that the above heading is an unfair way of representing the first question considered by the Committee, I will quote the exact wording of the minute of the 24th day of May, 1900 :—

While Her Majesty's Government do not think it desirable and do not propose to establish any general system of examination as to the novelty of inventions in respect of which applications for Letters Patent are made, and do not require any inquiry into any such system of examination, the Committee heretofore appointed is to inquire into the working of the Patents Acts with reference to the following questions :—

(1) Whether any, and, if so, what additional powers should be given to the Patent Office to—

- (a) control,
- (b) impose conditions on, or
- (c) otherwise limit

the issue of Letters Patent in respect of inventions which are obviously old, or which the information recorded in the office shows to have been previously protected by Letters Patent in this country.

In order to arrive at their decision under this head the Committee requested the officers of the Patent Office to

make an examination of all the complete specifications accepted during the first week in June in each of the three years 1897, 1898, and 1899, and to carry back these examinations to the year 1877. The result of this enquiry showed that of the total number of specifications examined :—

57'59	per cent.	were not anticipated ;
6'69	" "	had been wholly covered by previous patents ;
35'31	" "	had been partially anticipated in the same way ;
0'29	" "	were obviously old ;
0'12	" "	disclosed no manner of manufacture.

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100'00

The Committee considering the small number of patents which were "obviously old" do not recommend any examination on this head as distinguished from those which have previously been protected by Letters Patent. On the other hand the Committee were greatly impressed by the fact that 42 per cent. of the specifications appeared to be anticipated either in whole or in part. It would be well to bear in mind in the consideration of this question what may be alleged against the novelty of an invention for which Letters Patent have been granted. Firstly, the novelty of an invention will be defeated if it be shown that it was in public use within the United Kingdom at any time prior to the date of the Letters Patent granted in respect of it. Secondly, by a prior publication in a book or specification published in this country. The Committee do not propose, as indeed they could not, considering the scope of their inquiry, to deal with prior user or prior publication in books, and they have not recommended that any examination as to anticipation should be made by a search in the current literature available for such purposes. But they say that the grant of invalid Letters Patent is a serious evil, inasmuch as it tends to the restraint of trade and to the embarrassment of honest traders and inventors, and that the result of the search mentioned above by the Patent Office examiners is a cogent argument in favour of some enquiry as to

anticipation by prior Letters Patent. The object of their report under this head is to get rid of this evil. But does it not appear that the examination proposed would accentuate rather than diminish the mischief? After a partial examination an ordinary member of the public would think that the patent had some sanction, and that if it were issued without being ear-marked by the number and dates of anticipation alleged by the examiner of the Patent Office the Patent had not been anticipated and was valid. A great many people think that patents as they at present are issued by the Patent Office are good and valid grants, and in many cases are deceived. In my opinion, instead of any partial examination, it would be better to print distinctly at the head of each specification of Letters Patent published by the Patent Office, and in the Letters Patent themselves words to the effect that the patent is issued by the Crown at the risk of the inventor; that the Crown does not in any way guarantee the validity of the Letters Patent, or that the invention contained therein is novel, useful, or good subject-matter for the grant. This is ineffectually done in France by the insertion in the patent of the letters "S.G.D.G." which the public hardly recognise as meaning "*Sans garantie du gouvernement.*"

The majority of the Committee, on the other hand, recommend examination of previous specifications by the examiners, and in the event of any whole or partial anticipation being found that a correspondence with the inventor, as to the accuracy of his specification and claims should take place. Finally if the comptroller is satisfied he may seal the patent without any note, or if not satisfied he must seal the patent with a reference to any prior specifications by way of notice to the public.

It is commonly supposed in this country that inventors in Germany and the United States of America are very

greatly assisted by the *régime* which exists in those countries.

A careful inquiry will show that this is not the case. On the contrary, especially in Germany, they are greatly harassed by the parental care which is taken of them and their inventions by the examiners. What is really good in those countries is that there is an efficient staff of examiners who have allotted to them special subjects which they have thoroughly mastered, and which they are able to report upon when they are examining the specifications assigned to them. This is what should be copied, but when the Crown or the Authority steps out of its way to define the inventor's claim, it takes upon it certain responsibility. This may be evaded by enactment, but it remains morally and affects the public. The manner adopted by the Committee to get out of this difficulty is stated thus :—

That in any statute giving effect to the scheme which we submit a clause should be inserted negating any liability of the Patent Office for the completeness or correctness of the search.

The responsibility must rest either in the Government or the inventor, and is it not much better to leave it to the inventor ?

In doing this a patentee requires assistance, not interference. The general public should of course have a like consideration extended to them. A great deal has already been done by the Patent Office in this direction by the preparation of indexes and abstracts. If this were extended and amplified and the staff of examiners were increased, a competent staff of experts would soon be available at the Patent Office to give inventors the information they require concerning any particular invention. This should be available for the inventor or applicant for Letters Patent after his provisional specification has been filed, and to the public after the complete specification has been filed and the Letters Patent granted. No charge should be made,

as proposed, to the inventors, especially as there is an ample surplus paid into the Treasury by the Patent Office. If on the other hand any member of the public desired information on any particular specification a fee should be charged by way of defraying in whole or in part the expense of this staff. The course indicated above appears to be proposed by Colonel Harding, who appends note, in reference to which Mr. Spring Rice says—

“I prefer the amended scheme proposed by Colonel Harding.”

Colonel Harding says—

Further consideration of the scheme of the report makes me fear

- (1) That the procedure suggested will lead to tedious and vexatious discussion between applicants and the Department and will discourage poor inventors, who may not be able to afford a London Agent or to attend hearings before the Comptroller or the Law Officer.
- (2) That considerable additional labour will be thrown on the Comptroller and to a less degree on the Law Officer, and indeed in view of these the Committee has suggested that several qualified assistants should be provided to assist him in hearing appeals.

I am therefore in agreement with the Solicitor General in his contention, that while the inventor should have given to him the information readily available at the Patent Office, he should be left to amend or not to amend his specification as he shall see fit but I also agree with other members of the Committee that the information given to the inventor should be available for the public.

Colonel Harding then makes suggestions as to the particular means he would employ to place this information before the inventor and the public. When so distinguished a committee takes a view which would certainly lead to the difficulties which “further consideration” has made clear to at least three of their number, it is interesting to discover the point of the route where they have gone astray.

It may be that the words at the top of page 3 of the report give some indication of the situation, “or stated in other terms the examination shows that upwards of 42 per cent. of the specifications accepted appear to have been anticipated either in whole or part.” Now of these 35·31 per cent. are partial anticipations. To arrive at what



constitutes a partial anticipation the examiner must construe the claims proposed by the applicant, which is a difficult business sometimes even for the greatest of our judges to satisfactorily settle. The examiner is not a lawyer, his own duties already are very onerous and it would scarcely be reasonable to require or possible to find in him all the necessary qualifications especially at his present rate of pay.

Although not a part of the matter referred to them, the Committee have imported into the Report, and indeed have based the whole of their procedure upon it, a proviso which would render it unnecessary to make the search into deposited specifications date back further than 50 years from the date of the application. Their opinion is expressed in paragraph 10 of their Report:—

We are therefore of opinion that in addition to the existing enquiries an examination ought to be made in the Patent Office into the question whether any invention claimed in a deposited specification has been claimed in any, and what specifications of Letters Patent granted in the United Kingdom dated less than 50 years previous to the date of the application, that this inquiry should not be extended to provisional specifications which have been published but not followed by a complete specification, and that consequent upon the limitations of this inquiry, an enactment should be passed to the effect that the publication of an invention in specifications of Letters Patent granted in the United Kingdom dated 50 years or more previous to the date of the application, or in a provisional specification of any date of the kind before mentioned, shall not of itself be deemed an anticipation of the invention.

This appears to be a very sensible suggestion, for if nothing has been done in the direction for so long a period, it follows that the invention deals with a lost art provided no user has taken place in the meanwhile, and no other documents disclose the invention.

Of course it is impossible in dealing in a general way with a report of this nature to follow the recommendations made, paragraph by paragraph, but I think it is clearly shown, not only by the limitations imposed by Her late Majesty's Government on the inquiry itself, but also by the evidence recorded and by the disagreement of the

members of the Committee that any steps taken in the direction of interference with the inventor, as suggested by the report, would throw the Patent Office into chaos, that inventors would be unnecessarily irritated and the public placed in a worse position than it is at present. On the other hand the suggestions made above as to giving assistance to the inventor and the warning and information to the public, if carried into practice, would place the question as to examination and novelty of Letters Patent in an unequivocal position.

#### COMPULSORY LICENCES.

When the Board of Trade decided to give effect to the 22nd section of the Patent Act of 1883, by holding enquiries to consider the advisability of granting compulsory licences, it was well aware that the section was very meagre and did not provide efficiently for a proper hearing. But as they considered the principle of the enactment to be of great importance to the industry of this country, they determined to make the best of the materials provided and leave further developments to wait for future enactment. It is not surprising, therefore, that the committee has found fault with the scope and administration of this section, in the following terms: "There is a consensus of opinion amongst the witnesses that the 22nd section of the Act is beset with difficulties."

But is it not a little strong, considering the very small changes proposed to be made, that the committee should recommend that the section should be entirely repealed? In the forefront of its objections the committee states: "In the first place, the section makes no provision for the award or payment of costs."

Surely a clause to that effect in the rules or a new Act would have been sufficient.

The Committee then go on to state:

In the next place, the event on which the jurisdiction is to arise is defined in a manner which creates much difficulty. It is confined to the happening of one of other of three events as the result of a default of the patentee to grant licences on reasonable terms whereas, it appears to us, that the default of the patentee to work is as important as his default to grant licences. Again, one of the three events is, that the patent is not being worked in the United Kingdom, and it is evident that the interpretation of this condition is one of great difficulty, in respect of which the clause gives no guidance."

Although the wording of the section, like most sections in the Act, requires interpretation, a few decisions would have made the matter clear. In fact, in hearing some of the cases, I had already held that the section meant exactly what the committee have held should be the wording of the new enactment. See Clause 26 (b) page 7 of the Report)

That the event on which the jurisdiction is to arise be defined as follows. "when it is made to appear that the reasonable requirements of the public in reference to the invention have not been satisfied by reason of the neglect or refusal of the patentee to work or grant licences on reasonable terms."

The real reason for the repeal of the section appears in Clause 24, and is as follows:—

"Proceedings under the section may affect interests of a very high pecuniary value, and they ought, in our opinion to be safeguarded in the same manner as proceedings in an ordinary litigation, and not entrusted to any branch of the Executive Government

In other words the Committee think that the Board of Trade is not a proper tribunal to hear these cases, and that the jurisdiction should be transferred to the High Court of Justice. This involves a consideration of the constitution of the Board of Trade. As a matter of fact, practically there is no Board of Trade at all. It is a Committee of the Privy Council for Trade. Various committees and commissions, including a Joint Commission of Trade and Plantations, advised the Government with reference to the trade policy of the country till the year 1786, when a permanent committee of the Privy Council was formed by an Order in Council, which practically regulates the present constitution of the Board, and under it the important officers of State, including the Archbishop of

Canterbury, were made ex-officio members, and ten unofficial members were placed upon the committee. It is doubtful whether this Board actually exists, and practically the President is the only member of the Board present at any of its sittings, the business being carried on by a Parliamentary permanent secretary and six assistant secretaries. The particular department to which matters referring to Patents are assigned is the Railway Department. In this article we are not dealing with the question of the re-constitution of the Board of Trade so as to make it a body which would be strong enough to look after the interests of trade in this country apart from the consideration of party politics, but it is obvious that there is room for improvement in this respect. It is quite sufficient for present purposes to consider whether the Board of Trade as it exists is a competent tribunal to administer questions arising under this section. The Referees of the Board of Trade in the decision of railway matters and shipping matters have given satisfaction. The enquiries have been promptly held, and there has been no doubt as to the meaning of the decisions. Where dissatisfaction has arisen is when the judicial functions of the Board have been mixed up with the executive functions. If the Board of Trade, when appointed by any Act of Parliament to hear and determine any matter judicially, appointed an officer of the Board suitable for the work to hear and determine the matter at once there would be no objection on the part of the public provided there was no interference with that officer in arriving at his decision by Parliamentary or any other form of outside interference, and if in case any of the parties were dissatisfied with the decision of the Referee they had a right to have the matter reviewed by a competent tribunal on appeal. Of course the Referee should be someone who thoroughly understands the subject, and all matters should, if possible, be brought before him to secure

continuity in decisions and rapidity in arriving at them. Naturally, from the constitution of the Committee, the High Court of Justice would be selected as a preferable tribunal, but I do not think that the consensus of commercial opinion at the present time favours this method of hearing these technical matters because of the great expense involved; and what is more important, the uncertainty of the time of hearing, which plays havoc with the engagements of business men. Of course a Judge of the High Court who has been accustomed to dealing with these matters would be an excellent tribunal provided he or an equal could be relied upon for hearing the case, but the present constitution of the Courts does not admit of this. The result is that the public have in many cases to pay counsel for instructing the judges in the science and art, and history, of the particular matter before them. During this process eminent expert witnesses are reconciled to listen, by the payment of large fees. A judge of high scientific attainment was once put on the Bench for the purpose of hearing patent cases, but the experiment was not a success, because the commercial and practical element in dealing with these matters appeared to be wanting, and if the Government do not decide to make another experiment, in my opinion the complicated questions arising under the administration of this section had better be left to the Referees. One of the duties of the Judge or Referee is to fix the amount of royalty or the price to be paid to the patentee by the licensee. In order properly to fix such a price the Court hearing the matter should fix the amount. Now it is almost invariable that matters of this kind are referred by the Judge for assessment to a chief clerk in Chambers or the Official Referee. The Committee have evidently thought that most of these cases require assistance for they state in Clause G, paragraph 26, page 8 of the Report:—

That following the analogy of the 28th section of the Act of 1883, in all proceedings under this jurisdiction, the Court may, if it thinks fit, and shall on the request of either of the parties to the proceedings, call in the aid of an assessor, specially qualified, and hear the case wholly or partially with his assistance.

Now an expert is usually asked by the judge at an early stage what his opinion of the case is, and because he is necessarily a specialist in these matters he is most likely to have formed an opinion of the case before the hearing, so the side to which his opinion leans in the first instance has a very great advantage. Unfortunately, counsel do not know what that opinion is, and it is not always easy to get at it, because there is no right to address the expert, and consequently an advocate does not know how to frame his argument and what facts to elicit from the witnesses. If the expert were a judge he would feel more thoroughly the necessity of keeping his mind impartial, and counsel would have an opportunity of helping him to do so. A method adopted by some foreign countries is not open to this objection. A judge may ask experts for reports upon the matter. These reports are handed to the advocates, so that they may be criticised, and any error pointed out by either side. Perhaps if the assessor were asked to state his opinion on the facts, before the judge gave his judgment, and the counsel on either side had the right to cross-examine him, the difficulties might be avoided. At any rate, it is very seldom that any one of the parties ventures to ask for an assessor in ordinary patent actions, and the only cases in which it has been done is where some specific experiment had to be tried because of the difference of manipulations having resulted in totally different results in the hands of the opposing parties.

That the Board of Trade can separate its judicial from its executive functions is evident. All questions concerning the application and amendment of patents are left to the Comptroller-General of Patents, with an appeal to the Law Officers of the Crown. No departmental influence has

been brought to bear upon any of these decisions, but in cases arising under the 22nd section, a civil servant will hardly be a fitting tribunal, and the Court of Appeal would require to consist of a least three members who should be appointed with a view to secure a tribunal having knowledge and cognizance of the matter in question—say the Lord Chief Justice to preside, the Attorney-General or Solicitor-General, and a specialist in the art under consideration.

The remaining matters discussed by the Committee are of subsidiary importance. The third question as to the extension of time to 12 months to applicants for Letters Patent under the International Convention is properly allowed when taken in conjunction with the provisoes :—

That the foreign application shall be by complete and not by provisional specification : that the application shall be published on acceptance or at the expiration of 12 months (whichever shall be the earlier), and that similar concessions shall be made by the foreign Powers.

Incidentally two witnesses, Mr. Gordon and Mr. Jenkins, drew attention to the clause of defeasance in Letters Patent in the event of the grant being shown to be prejudicial or inconvenient to subjects of the Crown in general, but as the Committee negative the suggestion of defeasance in the event of licences not being granted it was not material to inquire whether there is already ample provision to deal with such matter in existing Letters Patent, although the chairman of the Committee would have preferred legislation in this direction.

Perhaps the most important condemnation of the opinions arrived at by the Committee appears in a note appended by Sir Edward Fry, the chairman :

I regret the omission of the inquiry whether the invention claimed is obviously old. I think that the inquiry if made in conjunction with that into anticipation by previous specifications, would add very little to the trouble of the examiner, and I fear that the omission of this inquiry may let through some of the patents which we require to check.

As the whole basis of the opinions arrived at by the Committee under the head of examination was to prevent the issue of fraudulent patents, surely the loophole left is amply sufficient for persons who set themselves deliberately to obtain money by fraudulent patents to accomplish their end. It would therefore be much better, instead of making the new departure contemplated, to consistently keep to the old method with the precautions in the interests of the public and the increased means of assistance to the inventor pointed out in the early part of this article.

So far neither by the Committee nor by the writer of this article has any method been suggested on the one hand of securing to the inventor a clear title, or, on the other of letting the public know for certain when they are trespassing on the rights of others. This seems to be the chief end at which the Committee were aiming in the first part of their enquiry, and capitalists or the investing public ought to have some means at their disposal, if they think fit, of establishing a clear title to their property before spending large sums upon the development of an invention. It may be said that this is best done by bringing an action for infringement. By that time, however, much capital would be spent, and perhaps a large part of it for an invalid patent. To remedy this why should not a patentee be allowed to go to the Court and ask for a confirmation of his Letters Patent much in the same manner as certain parties now have the right to ask its revocation? The patentee would, of course, be required to publish notices in the papers of his intention to apply for such confirmation as is now done when petitioning for an extension of the term of the grant of Letters Patent, so that the Crown and interested parties might oppose. . On a successful termination of the suit the patentee should have a good title



for the rest of the term of the patent. There would then be two classes of patents, one "at owner's risk" and the other beyond suspicion.

This last question is one of many improvements of the existing law with which the Committee would have been fully competent to deal, had their reference not been specifically restricted.

Unfortunately the hands of the Committee were tied from the beginning and many really important questions withdrawn from their consideration.

It is to be hoped that the Government will not be content with this half-hearted attempt to improve the Patent Laws and Procedure, but that they will in the near future give to the same or a similar Committee a full opportunity of investigating and reporting on a branch of the law which admittedly requires amendment and which, before all others, affects the welfare of our national industries.

R. W. WALLACE.

## II.—THE LATIN OF THE CORPUS JURIS.

THIS is a subject which, considering its interest, is remarkably bare of authority. Some writers concern themselves with general style, some with syntax, some—and these the least numerous—with words. The earliest writer to attempt anything like the subject of this article seems to have been Guarinus of Verona.<sup>1</sup> The *Parerga* of Brissonius is a better known work.<sup>2</sup> It is partly orthographical, partly grammatical. Thus he notices the use of the dative where the ablative would

<sup>1</sup> *Vocabularius breviloquus triplici alphabetico diversis ex autoribus necnon corpore utriusque juris collectus ad lat. num. sermonem capessandum utilissimus* (Strassburg, 1480).

<sup>2</sup> Frankfort, 1587; Paris, 1606. It does not seem to have been separately published, but appears among Brissonius' collected works,

have been used in the golden age, as in *stipulationi continentur*, and the accusative, as in *abuti dotem*, besides the frequency of non-classical phrases, such as *satis tempus* and conversely *certum temporis*. Then he deals with unusual words, most of which will be found in the following pages. His objections are to the Pisan text, and some of them would now be obsolete. There are incidental allusions to the solecisms of juristic language in Bartolus' *Consilia*, in Alciatus' *De Verborum Significatione*, in Joannes Leunclavius' *Notata*, in Scipio Gentilis' *Parerga* and *Origines*,<sup>1</sup> and in Cujacius' *Observationes* and *Commentary on Digest*, l. 16. But the next writer who treated the matter specially was C. A. Duker.<sup>2</sup> Then there is a long gap until the well-known work of Mr. H. J. Roby.<sup>3</sup> Last comes a careful German work by Dr. Wilhelm Kalb.<sup>4</sup> He finds many "Justinianisms" in the changes made by Tribonian in his authorities. Of course many of these must be purely conjectural. The works of Dirksen,<sup>5</sup> Heumann,<sup>6</sup> and the recent Berlin Vocabulary<sup>7</sup> are useful as collections of words, but do not distinguish between classical and non-classical uses.

For style various histories of Latin literature have been consulted, the most fruitful in results after Mr. Roby's perhaps being that of Professor J. B. Bury. The broad questions of style and syntax the present writer hardly

<sup>1</sup> The treatises of Leunclavius and Gentilis are contained in the *Thesaurus Juris Romani* (Leyden, 1729).

<sup>2</sup> *Opuscula Varia de Latinitate Jurisconsultorum Veterum* (Leyden, 1711).

<sup>3</sup> Introduction to Justinian's Digest (Cambridge, 1884).

<sup>4</sup> *Das Juristlatein* (2nd ed., Nuremberg, 1884).

<sup>5</sup> *Manuale Latinitatis Fontium Juris Civilis Romanorum* (Berlin, 1837). Explanations in Latin.

<sup>6</sup> *Handlexicon Zu den Quellen des römischen Rechts* (1st ed., Jena, 1856, numerous subsequent ones). Explanations in German. He does not mention Dirksen.

<sup>7</sup> *Vocabularium Jurisprudentiæ Romanæ editum jussu Institutii Savigniani* (Berlin, now appearing in parts).

History of the Later Roman Empire. (London, 1889.)

feels himself qualified to treat. No doubt language influenced law and law language<sup>1</sup>. The latter influence can be seen plainly among ourselves. It is difficult to read a page of a philosophical or scientific work without finding some obvious word which we owe to the Roman jurists. Person, obligation, action, mandate, stipulation, presumption, crime, capital, abrogate, appeal, are familiar examples. However, it is safe to remark that at a period when Latin was an exotic language in Constantinople, the capacity of the language for terse expression had been less modified than might have been expected. Modified no doubt it was, especially by becoming more analytic in construction, the preposition and the auxiliary tending to supplant the inflections of the noun and the verb, and *magis* and *magis* being used to form the comparative and superlative of adjectives and adverbs. But the Constitutions of Justinian still Latin, sometimes as good Latin as that of the 1st Antonine jurists, not Ciceronian perhaps, but sufficient. New words must be invented or adopted from another language, as they were in England by Glanvill and Bracton and others, to meet new circumstances. Hence new Latin is not necessarily bad Latin. Browning's sneer

"Lully, my masters! Ulpian serves his need,"

is unjustifiable. The language was, of course, becoming Græcised, just as the Greek was becoming Latinised. But an actual fusion never took place. Still, just as in the *textos aljamiados*, or Spanish documents written in Arabic character, there was a tendency, as Professor Bury shows,<sup>2</sup> to transliterate from one language into the other, culminating perhaps in the strange phrase *τοὶ Βίγκας* (*tu vincas*, the equivalent of our "God save the King"). Those

<sup>1</sup> See Dr. L. Günther, *Recht und Sprache* (Berlin, 1898.)

<sup>2</sup> Vol. II., 167.

who wrote in Greek adopted *φαιδνί, πατρίκιος, ρήξ*; those who wrote in Latin did not shrink from *apocha, chasma, emponema*.

In the following pages only words of interest on some ground or another will be touched. It is impossible in the space to give the authority for every word, but the references can easily be looked up in Dirksen or Heumann. The reader should never forget that the text of the Corpus Juris covers a period of many centuries, especially if the citations from the XII. Tables and the Edict be included. As to the citations from the jurists, the earliest seems to be Q. Mucius Scævola. Only the Corpus Juris and the Epitome of Julian have been used. Had the Theodosian Code been included, the results would have been more remarkable, as that compilation is a veritable storehouse of strange Latin<sup>1</sup>.

(1) *Revival of old words.* Several which seem to have ceased after Plautus and Terence come again into fashion. Such are *creiscere, rescire, riscus*. Others, like *Salararius*, occur elsewhere only in inscriptions.

(2) *Unclassical words.* The list of these would be so long that only a selection of those most interesting to a classical scholar can be given. They may be divided into those used only in the Corpus Juris and earlier texts and those used in a sense unknown or very rare in classical Latin. Among the former are *absimilis, aquagium, bastaga, intritutio, panniculariu, prepeditio, privilegiarius, quadri-fariter, ratiarius, remansor, sanctimonialiter, scribatus, stellionatus, tablizare, taxcota*. The latter form a much longer list, and it will be convenient to append after each word a short explanation, not of course absolutely correct, but sufficient to show the divergence from the older meaning. *Antecessor* (professor of law), *apex* (rescript), *athleta* (advocate), *aucupatio* (subtlety), *certiorare* (inform), *civilitas* (for

<sup>1</sup> See, for instance, the explanations of *cephalæota, digna, proponenda*, in Dirksen.

*civitas*), *comitiva* (dignity of comes), *commentariensis* (prison warder), *concameratio* (arched work), *conclave* (room), *conditio* (staff of servants), *corporaliter* (of an oath taken on the Gospels), *decanicum* (church prison), *decanus* (chief bearer at a funeral), *disputatio* (audit of accounts), *exceptor* (clerk), *familia* (school of candidates), *folius* (money), *functio* (payment of taxes), *gleba* (rent), *infula* (honour), *judicium* (testament), *junctura* (team), *latitare* (to deceive), *largitiones* (fiscus), *medietas*, *mediocritas* (half), *mensa* (fiscus), *notorium* (written information), *notitia* (writ of summons), *obsequium* (officium), *officium* (body of officials), *opinio* (certificate of land-tax), *palmarium* (honorarium), *prærogare* (to pay rent in advance), *profligare* (to exact), *religiosus* (member of an order), *retractatio* (rehearing), *schola* (corporation), *secreta* (privy council), *senator* (member of a schola), *servator* (municipal officer), *singularis* (shorthand writer), *solvere* (oportere), *sors* (plot of ground), *species* (special case), *sportula* (costs), *stare* (to appear as advocate), *suffragium* (military pay), *suggestio* (appeal), *supponere* (suppose), *suppositio* (pledge), *testato* (coram testibus), *tractator* (registrar), *tractoria* (order for purveyance), *transjungere* (to change mules in a team), *translatitè* (negligently), *transmittere* (remittere), *transversarius* (unexpected), *vacans* (one who fills no public office), *venaliciarius* (slaves broker), *venalicium* (slaves for sale), *vestigio* (immediately), *veteres* (the prudentes before Constantine), *unio* (pearl), *urbare* (to mark city bounds with a plough), *urbum* (furrow so made). Other unclassical uses are *quo magis* where *quo minus* might be expected, *latitare* with an accusative, *manere* meaning little more than *esse*, *numerus* as a particular rank in the public service, *felix* as a stock epithet of the state, the people, the camp, and the games. Prepositions are used vaguely, such as *trans* above. *De* often corresponds to the classical *in*, *ex*, or *per*. Thus for *defundere*, *defunctorie*, *indeptio* and *indere* the Latin of a better period would have used *effundere*, *perfunctorie*, *adeptio*, and

*addere* The phrase *sacra missa* for the mass occurs once in Julian's Epitome, lii, 194

(3) *Abstract Words* In many instances a feminine abstract substantive supplies the place of what would probably have been turned in another way in earlier Latin. Good examples are *facere retentionem*, *in tenacitate permanere*, *taciturnitati tradere* (to forget), *scientia ejus* (what he knows) Among words of some interest may be noted *apparitio* (a body of apparitors), *cultio*, *deitas*, *donatio*, *dubietas*, *jugatio* (a plot of land), *malitas*, *mansio*, *optio* (clerk), *porticatio* (verandah), *repensatio* (hms), *responsio* (responsum), *soluditas* (obligatio in solidum), *transactio* (subject of a compromise), *reditio res vendita*, *vetustas* (veteres), *visio* (treatment of a case) An enormous mass of abstract words came into vogue as titles of honours (especially of the Emperor) Such are *amplitudo*, *beatitudo* (of bishops), *celstudo*, *clementia*, *excellentia*, *experimentia*, *gratias*, *magnificentia*, *magnitudo*, *majestas*, *mansuetudo*, *numen*, *perennitas*, *pictas*, *providentia*, *prudentia*, *sancititas*, *serenitas*, *sinceritas*, *solertia*, *spectabilitas*, *sublimitas*, *tranquillitas* The use of neuter collective abstracts is illustrated by *officium* and *consilium* cited above

(4) *Poetical Words and Phrases* Such phrases as *auri sacra flamma* and *mois litis* (the conclusion of a suit) do not seem good pedestrian prose Among single words of a more or less poetical complexion are *omnipotens*, *bauchuri*, *bellicus curia*, *stebilis*, *intimuratus*, *insons*, *molimen*, *monile*, *prolixus*, *protervus*, *superemancere*, *superacacius*, *sons*, *sonticus*, *torus* and *Venus* (marriage) *tyrannus*, *versuolor*, *viripotens*.

(5) *Greek and Hybrid Words* (a) Greek words appear both in Greek character and transliterated The principal instances are in names of Court and ecclesiastical offices, such as *decaprotus*, *ironarcha*, *tamiacus*, in names of heretical sects, such as the awkward *tissarescaedecadila*, and in words with the suffixes *archi*, *mono*, *para-*, *pert-*, *syn*, *xeno-*, and *xylo-*. Excluding those of ordinary occurrence in non

legal writers, like *ænigma*, *bibliotheca*, *thesaurus*, there still remain hundreds of purely Greek words, used no doubt partly where the compiler was to seek in his Latin, partly where no Latin word sufficiently represented the shade of meaning required. Only some of the more interesting can be noticed here. Such are *agonotheta*, *alytarcha*, *analogistus*, *angaria*, *antichresis*, *antinomia*, *antapocha*, *apocha*, *aphorista*, *apostoli*, *apostolicus*, *arura*, *authenticus*, *biarchus*, *biocylula*, *boethus*, *chartoprates*, *chasma*, *chirographum*, *chlamys*, *chonia*, *cmeliarcha*, *dicta*, *cremodicium*, *ergastrium*, *emporion*, *emponema*, *emphyteusis*, *heresis*, *hierophylax*, *hierus*, *hypotheca*, *latomie*, *mastigophorus*, *mesonauta*, *metecus*, *monachus*, *nosocomium*, *nyctostrategus*, *orphantrophium*, *orthodoxus*, *oxyblatta*, *perissochoregia*, *pirota*, *proastium*, *ptochium*, *ptochotrophium*, *rhapsima*, *rhetor*, *rhompha*, *scheda*, *schisma*, *schola*, *scopelismus*, *sillus*, *silona*, *siphon*, *sophista*, *spharisterium*, *stigma*, *strobilus*, *sycaminon*, *syllaba*, *symbolum*, *symphonia*, *theca*, *trapezophorum*. One may compare with this Greek tendency the French tendency in England, which has left us the legacy of such terms as *celui que trus*, *celui que vie*, *feme covert*, *mesne*, *puise*, not to speak of constitutional phrases, such as *Le Roy le vult*. (b) Hybrid words are sometimes very curious, and were no doubt coined for purposes of convenience, without regard to philological accuracy. They are sometimes Latin and Greek compounded, sometimes Greek with Latin terminations. Some of the more interesting are *archigubernus*, *angariare*, *apochari*, *aurihalcum*, *automataria*, *chirographarius*, *conchyliolegulus*, *helæcrus*, *melloproximus*, *metropolitanus*, *pedagogianus*, *pragmatica sanctio*, *scholaris*, *tractata*, and many names of inhabitants of towns, such as *Constantinopolitanus* and *Theopolitanus*.

(6) *Etymology*. The Roman jurists, like the English, were more ingenious than successful in their etymologies. Instances are *furtum*, *mutuum*, *servus*, *supellex*, *telum*. They

do not, however, equal some of the amazing attempts made by non-legal writers, especially by Isidorus, who derives *codicillum* (sic) from the name of the inventor. Varro's derivation of *noxum* from *neque suum* is not much better. The question has been fully discussed by Ceci.<sup>1</sup> Similar hypothetical philology is frequent in Bracton, Coke and other writers. Bracton's derivation of *curator* from *cas sortitum* is no worse than Coke's *parliament* from *parler la ment*. Both Roman and English jurists had an ineradicable tendency to connect the termination — *ment* with *mens*. The derivation of *testamentum* from *testatio mentis* may be compared with Coke's. The etymological climax is attained by Britton (iii., 7, 1), who finding the *actio familie crescunde* in his authorities and being unable to explain it, followed Isidore and invented a family named *Erciscunda*.

(7) *Words used in different senses* in Roman and English law make a fertile study for the comparative jurist. In some cases, such as *jurisdictio* and *prescriptio*, the Roman term was originally used in a somewhat different sense and gradually developed to mean much the same as its English analogue; in others the terms of the two systems still bear different meanings and are apt to prove dangerous to the unwary. Such are the obvious words *adoptio*, *codicilli*, *familia*. Less obvious are *abolitio*, *actuarius*, *administrator*, *advocatio*, *aquilas*, *agens*, *alimonia*, *ambilio*, *burgus*, *canon*, *capitalis*, *cautio*, *collatio*, *commendatio*, *compensatio*, *consideratio*,<sup>2</sup> *consultatio*, *contributio*, *creditor*, *curia*, *curialitas*, *emancipatio*, *editor*, *executor*, *injunctio*, *jurisdictio*, *jurisprudentia*, *libellus*, *mandatum*, *modus*, *mulier*,<sup>3</sup> *ordinarius*, *premunire*, *proclamatio*, *representatio*, *servus*, *sponsor*, *subsidium*, *taxatio*, *usurpatio*

<sup>1</sup> *Le Etimologie dei Guiriconsulti Romani* (Bologna, 1892).

<sup>2</sup> Used three times in the Theodosian Code, but only once in the *Corpus Juris*, *In ejus rei consideratione etatis quoque ratio habeatur*, Dig. XLVIII. 20, 16, 3. In none of these places is there any approach to the English sense.

<sup>3</sup> In such phrases as *mulier pueri* and *mulier mulieratus*.



' *vicarius*.<sup>1</sup> There is further a tendency in England to concretise certain Roman abstract terms, e.g., a Roman jurist would not have understood *justitia* as a human being, a judge, or *obligatio*, *contractus*, and *voluntas* as meaning actual documents. Some terms in the Theodosian Code and the Corpus Juris strongly remind the reader of certain institutions in our older law. *Adgeratio* is a commuted service, like scutage, but of another kind, being not of military service but of the duty to supply provisions to the army, *leno* being the corresponding commutation in the case of recruits. With *decaprotus* compare the headborough, with *noxæ deditio* the deodand, with *sordida munera* villein services, with *angaria* and *tractorie* purveyance, and with *irenarcha* the *conseruator pacis*.<sup>2</sup> Of course the analogy in these cases must not be pressed too far, and the development in the two systems was no doubt independent, but they offer interesting resemblances to institutions which have had their importance in English legal history.

(8). The names of the varieties of beverages form a curious study. They seem to show a period at which the drinks natural to the South of Europe had lost some of their original monopoly in favour of the stronger and coarser malt liquors introduced by the invaders from the North.<sup>3</sup> The abstract *cellarium*, used like our "cellar"

<sup>1</sup> The title *Vicarius Britanniarum* does not occur in the Corpus Juris, but is used on the one occasion in which Britain occurs in the Theodosian Code (XI., 7, 2.) Britain is only twice named in the Corpus Juris. In Dig. XXVIII, 6, 2, 5, Ulpian uses as a precedent for an opinion on a point in the law of substitution a rescript *Imperatoris Nostri ad Virium Lupum Britannie Præsidem*. In Dig. XXXVI., 1, 46, is an extract from Javolenus on the construction of a will made by *Seius Saturninus, Archigubernus ex classe Britannica*. There is no allusion to any division or town of Britain.

<sup>2</sup> Outside the Corpus Juris there is a striking likeness between the *jus applicationis* of Cicero (De Or., i., 39), and the feudal commendation.

<sup>3</sup> This is quite in accordance with Tacitus' statement, *Potui humor ex hordeo aut frumento in quamdam similitudinem vini corruptus* (Germ., c. 23).

for a store of wines, is peculiar to the Theodosian code. The contents of the cellar, however, are denoted by numerous names in the Corpus Juris. The most comprehensive words are *potus*, *potio*, *poculentum*, and *pecus*.<sup>1</sup> Next to these comes *vinum*, which seems to be used in some places for any alcoholic drink, as in Dig. XXXIII., 6 (*De Tritico Vino vel Olco legato*), where there is a good deal of interpretation of the term as used in *legata*, chiefly based on the presumed intentions of testators. Thus *vinum* might include *acinaticium*, *mulsum*, *anomdeli*, *passum*, but not *acetum* (unless it had been wine at the time of making the will and become sour since), *camum*, *cercisia*, *hydromeli*, *defrutum*, *cydoncum* (cider), *syllum*<sup>2</sup>, unless there were strong evidence that the testator had been accustomed to consider all these as wine. *Vinum vetus* was wine a year or more old, unless he had been accustomed to use the phrase in a broader sense. There was also a good deal of interpretation of *vasa*, *dolia*, *amphoræ*, and other words for vessels that contained liquor<sup>3</sup>. Other beverages mentioned are *mustum* and *sapa*. There seems to be only one direct allusion to water for drinking purposes.<sup>4</sup>

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<sup>1</sup> This, though generally used of eatables, might include *vinum* (Dig. XXXIV., 9, 4).

<sup>2</sup> This seems to have been sometimes like our whisky, sometimes made of bread, like the Russian kvas. Dig. XXXIII., 6, 9.

<sup>3</sup> See Dig. XXXIII., 6 and L, 16, 206.

<sup>4</sup> *Aqua ad bibendum*, Dig. XXXIII., 7, 12, 10.

## III.—THE INNS OF CHANCERY.

“**B**UT my Prince,” wrote Sir John Fortescue, when Lord Chief Justice of England, to His Majesty King Henry VI., “that the method and form of the study of the law may the better appear, I will proceed and describe it to you in the best manner that I can. There belong to it ten lesser Inns, and sometimes more which are called the Inns of Chancery, in each of which there are a hundred students at the least, and in some of them a far greater number, though not constantly residing. The students are, for the most part, young men: here they study the nature of original and judicial writs, which are the very first principles of the law. After they have made some progress here and are more advanced in years, they are admitted into the Inns of Court properly so-called. Of these there are four in number. In these great Inns a student cannot well be maintained under eight and twenty pounds a year, and if he have a servant to wait on him (as for the most part they have), the expense is proportionably more: for this reason, the students are sons of persons of quality, those of an inferior rank not being able to bear the expenses of maintaining and educating their children in this way. . . . So that there is scarce to be found throughout the kingdom, an eminent lawyer who is not a gentleman by birth and fortune: consequently they have a greater regard for their character and honour than those who are bred in another way. There is, both in the Inns of Court and Inns of Chancery, a sort of academy or gymnasium, fit for persons of their station, where they learn singing and all kinds of music, dancing, and such other accomplishments and diversions (which are called revels) as are suitable to their quality and such as are usually practised at Court. At other times, out of term, the greater part apply themselves to the study of law. Upon

festival days, and after the offices of the Church are over, they employ themselves in the study of sacred and profane history. There everything which is good and virtuous is to be learned. All vice is discharged and banished, so that knights, barons, and the greatest nobility of the kingdom, often place their children in these Inns of Court; not so much to make the laws their study, much less to live by the profession (having large patrimonies of their own), but to form their manners and to preserve them from the contagion of vice. The discipline is so excellent that there is scarce ever known to be any piques or differences, any bickerings or disturbances amongst them. The only way they have of punishing the delinquents is by expelling them the Society, which punishment they dread more than criminals do imprisonment and irons; for he who is expelled out of one Society is never taken in by any of the others. Whence it happens that there is constant harmony amongst them, the greatest friendship and a general freedom of conversation. I need not be particular in describing the manner and method how the laws are studied in those places, since your Highness is never like to be a student there. But I may say in the general that it is pleasant, excellently adapted to proficiency, and every way worthy of your esteem and encouragement.”<sup>1</sup>

If the present Lord Chief Justice of England were invited by His Majesty King Edward VII. to describe the preparations made by the present Inns of Court for the education of the younger members of the legal profession, could he give as satisfactory an account at the present day as that just quoted referring to days long gone by? We fear not.

The educational character of the Inns of Court has

<sup>1</sup> *De Laudibus Legum Angliæ*. Translated with notes by Selden, 1737. Cap. XLIX.

sadly changed, while that of the Inns of Chancery has long wholly disappeared. For Selden, writing in 1737, observed "The eight Inns now remaining are mostly inhabited by attornies, solicitors, and clerks." Could the good old days of the revels and of the study of original and judicial writs "which are the very first principles of the law" be again restored, then surely "time" would "run back and fetch the age of gold." But time is quite otherwise employed: and very different prospects are in store.

Any person walking into New Inn now would certainly never dream of associating it with "revels," or with any society from which expulsion was to be dreaded more than imprisonment and irons.

"*Lucus a non lucendo*" is a method of nomenclature which all educated men desire to avoid. Yet learned people of all ages have been accustomed to give the name of "New" to that which they earnestly hope will some day be "old." "New College," Oxford, was already more than a century old, when a name was required for the then recently established Inn of Chancery, in Wych Street, and no better name than "New Inn" could apparently be found.

New Inn, which to-day is doomed to disappear in the interests of London betterment, is indeed a building of primarily antiquarian interest; but it so happens that its history is one which touches the lawyer about as nearly as it does the antiquary. So lately as the summer of last year the annals of the Inns of Chancery became the matter of an erudite discussion before Mr. Justice Cozens-Hardy in a case which arose out of the demolition of Clifford's Inn.<sup>2</sup> The question was whether in the case of that particular Inn the property belonged to the individual members for their own personal benefit or was held upon trust for

<sup>1</sup> In his notes to the *De Laudibus Legum Angliæ* above cited.

<sup>2</sup> *Smith v. Kerr* (1900) (2) Ch. 517

charitable purposes. Mr. Justice Cozens-Hardy decided in favour of the latter view.

In his judgment, however, he said: "It is a matter of public knowledge that the buildings belonging to or occupied by some of the old Inns of Chancery have been dealt with as private property. I do not desire in any way to cast a doubt upon the title of the present owners. It is for those who allege the existence of a charitable trust to establish it. If nothing more is known than that the property was purchased by funds subscribed by members of a voluntary society, such as an Inn of Chancery or was given by members of the society, if there are no title deeds or if the title deeds do not support a public trust, it may be well that the members for the time being are entitled to say that the property in Equity belongs to them and that there is no trust of a public or charitable nature affecting it." And he confined his decision entirely to the case of Clifford's Inn then before him.

It is therefore a question of fact in each case whether the purposes for which the property is under its title deeds to be applied are public and charitable in the view of the law. "If," said Vice Chancellor Sir William Page Wood, (afterwards Lord Hatherley, Lord Chancellor), "you find a gift from an individual or the Crown or the Legislature, of a sum of money for a purpose which is a charitable purpose, that is a charitable trust to all intents and purposes. But if you raise money for a purpose which in itself might be a charitable purpose by taxation from the very persons that would be benefited by that which would be a charity if it was a gift from another — if you raise it by taxation from those parties, then you are only taxing those parties to do themselves good. It amounts to that—that the parties are subscribing in a particular manner and form for their own individual benefit."<sup>1</sup>

<sup>1</sup> *The Attorney-General v. Eastlake*, 11 Hare, 217

*A fortiori* it would seem that if a number of men combine, *without any assistance by or interference from the Crown or the Legislature or any outside individual*, to benefit *themselves* by the establishment of some institution, then such an institution would not be a charity.

In the case of Clifford's Inn, however, the facts were very clear; for by an indenture dated 29th March, 1618, the Earl of Cumberland and Lord Clifford "granted bargayned and solde aliened enfeofed and confirmed" the messuage and premises known as Clifford's Inn to certain members of the Society as trustees in consideration of £600, with a declaration that the true intent and meaning of the deed was that "the said capitall messuage now called by the name of Clifford's Inn should from thereafter reteyne and keep the same usuall and antient name of Clifford's Inn and should for ever thereafter be contynued and employed as an Inn of Chancery for the good of the gentlemen of that Societe and for the benefytt of the Commonwealth as aforesaid and not otherwise, nor to any other use intent and purpose."<sup>1</sup>

In Maitland's *History of London* we read: "At the corner of Seacoal Lane in Fleet Lane was situate an Inn of Chancery; but the same being found too remote from the Courts at Westminster, the students removed to New Inn near Drury Lane," and again "New Inn is a House of Chancery, situate in Wych Street contiguous to St. Clement's Inn on the West, which was founded about the year 1485 in a common Inn, for the reception of the students of an ancient Inn of Chancery formerly situate at the South East corner of Seacoal Lane. This Inn, which is an appendage to the Middle Temple, is governed by a treasurer and twelve ancients, who with the other members are to be in commons a week every term or compound for the same."<sup>2</sup>

<sup>1</sup> *Smith v. Kerr* (ubi supra) p. 513.

Ed 1760, Page 991.

<sup>2</sup> *Ibid.* Page 1279.

Stowe tells us that "New Inn is so called as being more lately made of a common Inn and the sign of Our Lady, an Inn of Chancery for students than Clement's Inn, namely about the beginning of the reign of King Henry VII., and not so late as some have supposed, to wit at the pulling down of Strand Inn in the reign of King Henry VI. For I read that Sir Thomas More, sometime Lord Chancellor, was a student in this New Inn and went from thence to Lincoln's Inn."<sup>1</sup>

From all of these passages there remains no kind of doubt what sort of place and what sort of an institution the founders of New Inn intended it to be : but its present position in law is quite a different matter. And if anybody seeks to establish that there is any trust or charity affecting it, he must do so by strict proof. The test has been already indicated :—Did the original founders combine, *without any assistance by or interference from any outside individual*, to benefit *themselves* by the establishment of an institution? Or were the premises conveyed to the Society or any of its members upon a trust of a *public and charitable* nature?

Nobody will raise a hand to save the actual building of New Inn. Ruskin said "A fair building is necessarily worth the ground it stands upon." We doubt whether the London County Council would agree with him. But in this case it matters not : for New Inn is not a "fair building." The life, however, of the Inn in the days when it was really "new" and played its part among the other similar institutions described by Fortescue was something "fair," and its memory is surely worth preserving. And if Mr. Justice Cozens-Hardy had lived some centuries ago and had seisin of some case involving the legal position of all those old Inns and their "ancients," we do not think—

<sup>1</sup> *Survey of the Cities of London and Westminster*. 6th ed. 1755. Page 576.

<sup>2</sup> *The Seven Lamps of Architecture*, Chapter VI, Sect. XX.



having regard to the probable truth as to the facts—that he would have permitted them to become what fate has decreed that they should be in the lapse of time.

E. A. JELF.

[NOTE.—There does not seem to be material available for any very detailed history of New Inn, unless of course the secret muniments of the Society may chance to afford such material.]

#### IV.—ROMAN LAW: ITS STUDY IN ENGLAND.

THE second English edition of Professor Sohm's *Institutes of Roman Law* has already been noticed in the February issue of this magazine. In the course of this article, we hope, in addition to discussing the subject of the study of Roman law in England, to make some further reference to Professor Sohm's work, and also to a small book by Mr. W. H. Hastings Kelke, recently published, of a less ambitious character than the first-mentioned work, but which we think will prove useful to students. Not the least interesting portion of the new edition of Professor Sohm's *Institutes* is the description of the Pandect law in Germany, and the account of the new German Civil Code, which came into force on January 1st, 1900, and which has superseded the old Common law (*i.e.*, the Pandect law) of Germany, as well as the particular private law (v. §§ 2-5). The new chapter on the subsequent fate of Roman law (§§ 23-28) is also highly interesting, and well worthy of careful study. In connection with the German Civil Code we may observe that its effect is to place the study of Roman law in Germany on much the same footing as in England, *i.e.*, it makes it purely academical, subject to this reservation, namely, that the Roman law was once *jus receptum* in a large part of the German Empire, and must therefore, though shorn of its former authority, still enjoy a large measure of its old influence and importance.

In this country the Roman law has been less fortunate in obtaining a footing. If it has not been actually despised, it has, nevertheless, been treated with ill-concealed aversion and suspicion, and though a goodly portion of it has been incorporated into English jurisprudence the borrowing has been mostly unacknowledged, and the form and outline have not been preserved.

The topics that are covered by the convenient term of "Equity" are largely permeated by Roman law, and the law and practice of the Probate, Divorce, and Admiralty Division are still based, to a great extent, upon those rules of the Civil and Canon law which were adopted by the old courts at Doctors' Commons, courts in which, up to 1857, civilians enjoyed the monopoly of judging and pleading, a fact which, at least in name, connected the law faculties of Oxford and Cambridge with the practical administration of the law. But the position of Roman law in this country has always been a precarious one, and it is only by accentuating the importance of its study as affording a training in legal ideas and as a means of forming what may be called the juristic mind that it can be secured in the future the respect which its past eminence and the great reputation of the German jurists of the nineteenth century will continue to secure for it in Germany. In connection with the chapter on the subsequent fate of Roman law, we may observe that Professor Sohm has done a valuable service in laying stress (§§ 25 and 27) upon the importance of the labours of the glossators and commentators. The former, by means of an elaborate exegesis, gave the *corpus juris* to the world as a consistent and harmonious whole. The latter (whose labours have been unjustly derided as the puerile quibblings and hair-splittings of frivolous pedants) achieved the task "of building up, on the foundations furnished by the glossators, a Roman law which

might be applied in actual life and which, as such, might serve (in the first instance for Italy) as a living *common law*." The reception of the Roman law in Germany, and the causes which brought about its decline and led to the passing of the German Civil Code, are graphically sketched in § 28. We now propose to give a brief historical account of Roman law and its study in England.<sup>1</sup>

The revival of the Roman law in Italy at the hands of the glossators was felt in England, and for a time it seemed as if it had come to stay. Various causes, however, contributed to make its influence in this country less permanent than on the Continent. Among other causes may be mentioned the absence of any theory like that of the continuity of the Empire, and the existence of a strong central authority, enforcing a law which, crude as it was, commanded the sympathy of the dominant classes of the community.

A strong nationalist reaction against the reception of the Roman law set in; there was—to use the phrase of the learned authors of the *History of English Law*—a healthy resistance to foreign dogma. Stephen endeavoured to suppress the Civil and Canon law in this country, and to silence the "Magister Vacarius," who taught law in Oxford, and who compiled for the use of poor students the *liber pauperum*, "a condensed version of Justinian's Code illustrated by large extracts from the Digest." Professor Holland is of opinion that, notwithstanding the efforts of Stephen against the study and teaching of the Roman law, it nevertheless had an "arrested reception" here. He refers to the writings of John of Salisbury, William of Malmesbury, and Peter of Blois, and to the preface to Glanvill's *Treatise on the Laws and Customs of England*,

<sup>1</sup> I must acknowledge once for all my debt to the *History of English Law*, by Sir F. Pollock and Professor Maitland, to *Roman Canon Law in the Church of England*, by Professor Maitland, and to the articles on the College of Advocates and on Civil Law in the *Encyclopædia of English Law*.

which, he says, is modelled on the Proem to Justinian's Institutes. The writings of Bracton—who was a judge of the King's Court in the reign of Henry III., and who died in 1268—have frequently been cited in illustration of the influence of the Roman jurisprudence upon English law. This view, however, is, according to the best authorities, an exaggerated one. Bracton's work is described by Professors Pollock and Maitland as "Romanesque in form, English in substance"—"his endeavour is to state the practice, the best and most approved practice, of the King's Court, and of any desire to Romanize the law we must absolutely acquit him." In England, then, the study of Roman law declined, although degrees in civil law were granted by Oxford and Cambridge, and in certain courts, such as the Court of Admiralty and the courts of the universities, the law and practice were based upon the Roman law<sup>1</sup>

In the reign of Henry VIII. the Canon law was destined to receive a severe blow, and its academic study was prohibited. The Civil law, which was profoundly Erastian in its tendencies, recognising as it did the right of the secular prince to legislate in matters ecclesiastical and theological, and which had previously been "chiefly studied as a preparation for the canonist's more lucrative science," received a fresh lease of life.<sup>2</sup> Chairs of Civil law were

<sup>1</sup> It may be asked how the Roman law, slighted and neglected in England, has taken such deep root in Scotland, amongst a race substantially the same as the English and having many laws and institutions in common with them. The key to the question is supplied by Professors Pollock and Maitland—the Roman law that came to Scotland was the law of the later commentators who flourished from the middle of the thirteenth century onwards, and who, instead of merely striving, like the glossators, to elucidate the text, attempted, by a process of deductive reasoning from first principles, to extend the Roman law, and bring it into harmony with the changed conditions of the times in which they lived (*vide* Solm, § 27). The old connection of Scotland with France will also go far to explain the influence that Roman law has exercised upon the laws of North Britain.

<sup>2</sup> Lyndwood, the eminent canonist who flourished in the fifteenth century, recommends the study of only such parts of the Civil law as are referred to in the gloss on the canon law (Maitland, *Roman Canon Law in the Church of England*, p. 46).

founded at Oxford and Cambridge, and the professorship of Civil law at Oxford was held at the beginning of the seventeenth century by Alberico Gentili, an Italian civilian, who had been exiled on account of his religious opinions, and whose three books, *de jure belli*, entitle him to take rank amongst the early writers on International Law. To his teaching, in Professor Holland's opinion, the recovery by the civilians of a great portion of their prestige (*i.e.*, the prestige they formerly enjoyed when they practised chiefly as canonists) is to be ascribed.<sup>1</sup>

The civilians not only enjoyed the monopoly of practice in the ecclesiastical and admiralty courts, but held various important posts, such as Dean of the Arches, Official Principal of the Archbishop of Canterbury, and Judge of the Court of Admiralty.

The "doctors exercent in the ecclesiastical and admiralty courts" acquired in 1567 a habitation (like the common lawyers' Inns of Court) near St. Paul's, at what is still known as Doctors' Commons. Unlike the barristers, the advocates of the civil law were incorporated in 1768. But the triumph of the civilians after the Reformation was a brief one, and their decay, notwithstanding the "short St. Martin's summer" they enjoyed in the days when Lord Stowell presided in the Court of Admiralty and helped to develop the law of prize, has been graphically sketched by Professor Maitland (*Roman Canon Law in the Church of England*, pp. 95-97).

In 1857, when the new Probate and Divorce Courts were established, and the ecclesiastical courts were deprived of their jurisdiction in testamentary and matrimonial causes, the College of Advocates was abolished, and the exclusive

<sup>1</sup> Nevertheless, after the Reformation the civilians seem to have shared the odium of the canonists—"the books of the civil and canon law were set aside to be devoured by worms, as savouring too much of popery" (Ayliffe, quoted by Prof. Holland in article on Civil Law in *Encyc. of English Law*).

privileges of advocates (as distinct from barristers) have since entirely disappeared.<sup>1</sup> We may well question the wisdom of abolishing an institution which has produced such men as Sir Leoline Jenkins, Lord Stowell, Dr. Lushington, Sir Robert Phillimore, and Sir Travers Twiss, all learned men in other than a merely conventional sense—scholars as well as practitioners. In fact, the danger of neglecting the scientific study of law is no slight one.

The increasing bulk and complexity of our laws, the volumes upon volumes added to the statutes and law reports, make the task of intelligently grappling with the meaning of the law one of ever-growing difficulty. It is by the scientific study of those principles which are common to all systems of law that what we have called the juristic mind, the mind capable of grappling with details and intelligently applying rules to fresh combinations of facts, can be best acquired. And it is here that the value of Roman law comes in: its wealth of principle, its logical precision and clearness, and the elegance of its vocabulary—a vocabulary that has been borrowed not only by jurisprudence *stricto sensu*, but by International law, and which stands in marked contrast to the rugged and uncouth language of our own law—render it invaluable for the purposes of legal study and the expression of general principles and conceptions. The striking words of Professor Sohm (§5) are well worth quoting in this connection:—

“From the intellectual labours bestowed by jurists on the law of the Pandects for several centuries, jurisprudence has reaped an abundant harvest of legal conceptions which have a scientific value of their own, the importance of the results achieved in this field being, in a large measure, independent of the

<sup>1</sup> Readers of Dickens will remember the amusing descriptions of Doctors' Commons and its practitioners in *Sketches by Boz* and *David Copperfield*. The description in the former of the case of Sludberry and Bumble (suit for brawling) is well worth reading.

particular form which the law for the time being in actual force may assume. There are a number of tools, so to speak, which no working jurist can dispense with, and the Pandects were the workshop where these tools of the science of law were manufactured, stored, and carried to ever greater perfection."

It is gratifying to observe the progress made by Roman law in England in recent years. Its academical study, which, according to Professor Holland, died away by the middle of the eighteenth century, has been revived, and (not to mention Mr. Ledlie's admirable translation of Sohm's *Institutes*, the new edition of which has been already noticed) the works of Moyle, Poste, Hunter, Muirhead, and Holland, to say nothing of the great name of Sir Henry Maine, sufficiently attest the reality and vigour of the revival. We would not for one moment be supposed to minimize the importance of a sound practical and theoretical knowledge of modern law, but the value of Roman law, as furnishing a mental discipline, cannot be too strongly insisted on, especially when we remember that it is no mere collection of archaic rules, interesting only to the antiquarian, but a great legal system that has formed the groundwork of the laws of most of the States of Europe, besides serving as the foundation upon which the science of International law has been built up.

In reverting to the second English edition of Professor Sohm's *Institutes* we may be permitted to make the following observations. The learned author informs us (at p. 479, n. 2), in discussing the interdict *de liberis exhibendis*, that Antoninus Pius "*benè concordans matrimonium separari a patre prohibuit*" (Pauli Sententiæ, v. 6, 15). Professor Sohm does not refer to an extract from Ulpian (D. 43, 30, 1, § 5), from which it appears that the father was not to be permitted to destroy an harmonious union between husband and wife by a wanton exercise of his paternal power. Moral suasion, however (at any rate in the first instance), was to be the instrument employed if the father attempted to recover the custody of a married daughter by means of

the interdict *de liberis exhibendis*.<sup>1</sup> Ulpian evidently has in his mind the rule of A. Pius before referred to.

Again, referring to the interdict *de liberis ducendis*, Professor Sohm says that it lay where the third party did not himself claim power over the child, but merely appeared as the child's "*defensor*," for the purpose of objecting to the father taking him home (pp. 503-4). Professor Sohm, however, has omitted to say that this interdict appears to have been granted as a kind of sequel to the interdict *de liberis exhibendis*, and that it forbade the employment of violence with the object of preventing a father from taking away a son whose production had already been ordered by the last-named interdict, "*deinde ait Praetor si Lucius Titius in potestate Lucii Titii est, quo minus cum Lucio Titio ducere liceat vim fieri veto . . . Itaque prius interdictum, quod est de liberis exhibendis, preparatorium est hujus interdicti, quo magis cum quis duci possit, exhibendus fuit*" (Ulpian, in D 43, 30, 3, pr 1.)

We observe that Professor Sohm is of opinion that *res mancipi* were, in the earliest times, things that could be held in separate ownership, things capable of being taken with the hand, i.e., moveables, and that in the historical period they represented "the privileged things of early Roman law, the things which were regarded as constituting the staple of the farmers', and, at the same time, of the nation's property." (v. §§ 9 and 59.)

We now propose (before concluding the present article) to make a few remarks on Mr Kelke's little epitome of Roman law. Though it is obviously only designed for the use of students at the Universities and Inns of Court, it, nevertheless, contains a great deal of valuable information in a

<sup>1</sup> "*Quod tamen sic erit exhibendum, ut patri persuadatur, ne acerbe patriam potestatem exerceat.*"

<sup>2</sup> *An Epitome of Roman Law.* By W. H. Hastings Kelke, M.A. London: Sweet and Maxwell.



very accessible form. We venture to make the following criticisms:—At p. 15 Mr. Kelke says that the *judex* “decided issues of fact.” What about a *formula in jus concepta*? Again (at p. 26), he describes Bonitarian ownership as “actual possession;” this is rather inadequate, if not actually misleading. At p. 142 the Proctor is said to have granted *bonorum possessio* of half freedman’s goods to patron “as against intestate’s children”; it ought to be “as against intestate’s adoptive children” (v. Gaius iii. 41, Inst. 3, 7, 1). At p. 184 we notice a serious mistake: the author says that in the *actio de peculio et in rem verso* the principal, provided he had profited in fact, was liable, but only to the extent of so much of the *peculium* as was invested in the business (*merx peculiariis*). This is incorrect; so far as the principal had profited, in fact he was liable *in solidum*; so far as he had not profited in fact he was liable to the extent of the *peculium*, not merely to the extent of so much of the *peculium* as was invested in the business (*merx peculiariis*). Vide Inst. 4, 7, 4. Again, at p. 196, *culpa in abstracto* is put for *culpa in concreto*, and vice versa. Again, at p. 203, Mr. Kelke says that *condictio indebiti* did not lie in cases where a false denial of liability doubled damages, nor in the case of certain legacies; but the legacies he refers to are instances of *lis crescens* (vide Dr. Moyle on Inst. 3, 27, 7). We would recommend Mr. Kelke to make a careful revision of his book on the first opportunity. Subject to these oversights it is remarkably full and clear. Again (at p. 239), it is stated that the interdict *utrubi* “was granted to him who at date had had longest possession in immediately preceding year;” the condition “*ne vi, ne clam, ne precario ab adversario*” is omitted (vide Inst. 4, 15, 4). At p. 241 we are informed that under Justinian, “so-called interdict was mere preliminary step, like Eng. ‘interlocutory Order,’ in course of ordinary action for possession.” It would be more correct

to say that in the time of Justinian the interdict was an ordinary action (*vide* Moyle, on Inst. 4, 15. Sohm, p. 310).

We observe that Mr. Kelke adopts the view that *in jure cessio*, as a form of conveyance, was not so old as *mancipatio*; also that he holds that *res mancipi* were the "usual objects of commerce among primitive agricultural proprietors."

The concluding "notes on words and phrases," and the appendix—containing references to authorities, analysis, and tables of events, jurists, emperors, laws, &c.—are likely to prove of great assistance to students.

T. W. MARSHALL.

## V.—THE ORIGIN AND HISTORY OF THE KING'S BENCH DIVISION.

IN England, as in other countries which either wholly or in part adopted the Feudal system, a standing council assisted the Sovereign in administering justice, managing the revenues and generally transacting the business of the State. Called in this country the Curia Regis, it corresponded in many respects to the Cour de Roy, an ambulatory court evolved under Hugh Capet out of the ancient French Parliament, which became a fixed tribunal when Philip the Fair in 1302 located one branch in Paris and another at Toulouse. Similar, too, in many ways, were the Aulic Council of the German Empire, and the Curia Regis of Scotland, from which in later times emerged the Courts of the Exchequer for fiscal, Session for civil, and Justiciary for criminal matters.

The English Curia Regis gave birth in a somewhat similar manner to the three great Courts of Common Law—the King's Bench, the Common Pleas and the Exchequer—which are now united and merged into the King's Bench Division of the High Court of Justice. The early history of those courts is surrounded with difficulties.

For one thing, the general term *Curia Regis* is an exceedingly confusing one. It is used indiscriminately to denote the Common Council of the realm, which for present purposes may be called the *Curia Regis A*: the select council, with duties both of an administrative and judicial character, which may be called the *Curia Regis B*: and—at any rate from the reign of Henry II.—the King's Bench, which may be called the *Curia Regis C*. But what makes the matter yet more complicated is that each, even after its separate existence, still at times arrogated to itself the name of *Curia Regis*, while the King had so free a hand in such matters that more than one experimental system was tried by Henry II. As an explanation, however, it must be remembered that in all early constitutions the distinction between the administrative and judicial functions was exceedingly vague; and thus it happened that the *Curia Regis B*—which, as a matter of fact, was little else than a standing committee of the *Curia Regis A*—not only combined those functions, but was, in addition, a legislative assembly. Still, vast as its powers were, it was not in those days regarded as an anomaly. For, as in the case of the King, it was considered only natural that it should perform those different and conflicting duties. To its existence, in any case, nearly all the administrative and judicial institutions of this country owe their origin.

At the time of the Norman Conquest, the judicial systems of the two races had little in common. The main feature of the Norman was centralisation, and of the Saxon, decentralisation. Yet their system of procedure had this in common. Neither had yet emerged from the primitive stage in which supernatural intervention was sought for in difficult cases. Our first Norman King, however, interfered with existing Saxon institutions no more than he considered necessary for the establishment of his authority,

and in the way of express legislation he did little. Thus nearly all the alterations which his era produced had for many years been recognised customs before they subsequently appeared in the written law.

The Curia Regis B, or the Aula Regis, as it was sometimes called from the fact that it assembled in the hall of the King's Palace, or, indeed, wherever he might happen to be—was the outcome of this Norman plan of centralisation. The main object of its creation was the establishment of a tribunal which was to be at once a Court of first instance for important matters, and a General Court of Appeal for the whole Kingdom. The Constable, the Marshal, the Seneschal, the Chamberlain, the Chancellor—in those days merely chief of the Royal secretaries—and any other persons the King might appoint, were the members of the Court; and over them, as *capitulis iusticiarius totius Angliæ*, was placed the Chief-Justiciar. The appointment of this official had been rendered a necessity by the frequent absences of the King in Normandy, and by the enormous amount of business which had to be transacted. At first he was simply a regent, appointed to govern in the King's absence; and though the growth of his subsequent pre-eminence was as gradual as the origin of his title is obscure, his office became permanent and increased considerably in importance, when William Rufus placed into the hands of Ranalph Flambard the administrative and judicial institutions of the kingdom. Briefly, therefore, the Justiciar was the first subject of the realm, the principal Minister of State, the president alike of the King's Court and the Exchequer, and the regent of the Kingdom in the Sovereign's absence, whose powers extended even to issuing writs in his own name. After the fall of Hubert de Burgh in 1233 this great office lost its importance, and is even said to have become practically extinct. The first purely judicial official of

this name was. Robert de Bruce, grandfather to the Scottish King, who, on 8th March, 1268, was appointed *Capitalis Justiciarius Placita ad Coram Rege Tenenta*, the designation subsequently employed to describe the Chief of the King's Bench. It is said that Hugh le Despenser, who fell at Evesham, was the last Justiciar who was chief of the army as well as the law ; and that the illustrious Bracton was among those who held this great office.

The Curia Regis B gradually lost its *raison d'être* after the establishment of regular Courts. From the very beginning of the Norman period, one of its branches appears to have dealt exclusively with matters concerning the revenue, and with the two Williams this was known as *Fiscus* or *Thesaurus*. Transacting in this manner different business, and located in a different part of the palace, this branch under Henry I. became, in a manner, distinct from the whole ; and, though still composed of the same individuals, it came to be known as the Court of Exchequer. Under its new name, which was apparently derived from the chess-board squares which covered the pay table, it grew into increased importance. Its methods of receiving money are exceptionally interesting. In receipt for payment, a stick or tally was given, a half of which was retained by the Court ; and it was the accumulation of these tallies and their careless use as fuel which originated the Houses of Parliament fire in 1834. The extant Exchequer rolls, or great rolls of the pipe, begin with 2 Henry II. ; and the whole series is from then complete with the exceptions of 1 Henry III. and 7 Henry IV. They contain the accounts of the King's revenue year and year as made up by his officers, sheriffs and ministers ; and they give us a list of the Crown's debtors. But there is one much earlier roll, consisting of 14 smaller ones stitched together, which is of extreme interest as being official evidence of events which occurred prior to 1154, of which otherwise we should

know little. Like many other documents of those times, the roll is undated. In turn it has been ascribed to 5 Stephen and 1 Henry II. But it has now been proved to belong to 31 Henry I.

In the reign of Henry II. the Court of Exchequer appears to have become actually detached from the Curia Regis B, though its organisation as an entirely distinct Court with a separate staff of judges was not effected till a century later. From the reign of Edward II till the death of Sir Fitzroy Kelly in 1880, the Court was presided over by a Chief Baron, and its judges were styled Barons from the days when they were chosen from the ranks of the great Crown vassals, till the provisions of the first Judicature Act came into force. It will be remembered that the last English judge who bore that historic designation was the late Mr Baron Pollock. Under the Norman Kings the Exchequer was one of the most important departments of the State, and it is to this cause that the system of purchase, which till so recently clung to one of the branches of our public service, owed its origin. Thus in the early roll, already mentioned, the Chancellor of that date is recorded as owing immense sums *pro sigillo*, though some authorities deny that this entry has any reference to the great seal. Still few Acts of the Crown, during this period, had any object but that of obtaining money, and even justice itself appears to have been administered for little else.

The Exchequer was divided into an administrative and a judicial side. Account and receipt departments for the regulation of matters connected with the revenue were comprised in the former; and the latter possessed an equity jurisdiction—abolished only in 1841—and a common law one, which was established by the fictitious writ of *Quo minus*. The origin of the fiction is to be ascribed to the limited jurisdiction which the Exchequer in the first

instance possessed. Properly speaking, it had power but to deal with matters concerning the royal revenue. But the judges, who were partly paid in suitors' fees, somewhat naturally desired to extend their business; and this they accomplished by encroaching upon the province of the other Courts. A series of enactments endeavoured to restrain them. Thus in the *articuli super cartis* of Edward I. (1300), it was enacted that common pleas should no longer be heard at the Exchequer, a proceeding contrary to the provisions of the Charter. Nevertheless legal ingenuity found little difficulty in surmounting this obstacle, and a fiction was invented to meet the case. It was in consequence held that suitors were in all cases debtors of the King, who were unable to pay him his dues through the remissness of their own debtors; and in this manner the Court eventually became available for most things to all men. From the equity side appeal lay direct to the House of Lords, and from the Common law side writ of error lay—from the reign of Edward III.—to the Court of Exchequer Chamber. Finally, by the joint effect of the Judicature Act of 1873, and an order in Council of 1885, the Exchequer, like the Queen's Bench and the Common Pleas, was merged in the Queen's Bench Division of the High Court of Justice.

The reign of Henry II. was an important one in the history of the Courts. In 1174 that monarch reduced the number of judges in the Curia Regis B from 18 to 5, doubtless finding that the larger number was a source both of needless expense and confusion; and this body of 5—nominally only *coram rege*, but designed to follow the King about the country—was the forerunner of the Court of King's Bench. Cases of special difficulty were to be taken from this tribunal to a Court of Appeal, which was in effect the King in his Council; and it was from this latter assembly, which as regards composition and powers

was little else than the Curia Regis B of earlier times, that the Privy Council derives its judicial authority and the Chancellor his equitable jurisdiction. Moreover, it was from this source—combined with the effects of a developing Parliament—that the *magnum concilium* of the next century sprang, from the powers of which body the House of Lords derives its authority as a Court of Appeal. Throughout his reign Henry was certainly an organiser rather than a legislator; but not the least of his achievements was the placing of the law in the hands of the most learned men of his time and those best qualified to administer it satisfactorily. These, it need hardly be stated, were ecclesiastics well versed in the canon law; and it is, therefore, perhaps not too much to say that the Common Law of England was fashioned into an intelligible shape, out of a mass of tangled and contradictory local custom, by priests of the Church of Rome.

It has been said that a distinct tribunal for the consideration of private suits existed in the time of Richard I. But in any case the establishment of such a Court was effected by the 17th Clause of Magna Charta, which provided that the hearing of Common Pleas should no longer be dependent on the movements of the King, but that, for the convenience of suitors, a fixed Court should from thenceforth be established. In this manner the Court of Common Pleas—the lock and key of the Common Law—which alone of the three Courts, properly speaking, had power to deal with private suits, was established at Westminster. Nevertheless, the Court on more than one occasion did subsequently sit away from Westminster. Indeed, at the commencement of Edward III.'s reign, this seems to have been a comparatively frequent occurrence, since in 1328 it was deemed necessary to pass an Act which provided that Common Pleas should not be removed without warning, so that parties might not thereby



"lose their process." Common Law has been defined by Blackstone as the "general customs which are the universal rule of the whole Kingdom, and form the Common Law in its stricter and more usual signification." There were, however, certain local customs which affected the inhabitants of particular districts; and it is probable that our Common Law during its transitory stage between the reigns of Henry II. and Edward I. was selected largely from this mass of local custom. Thus the system of primogeniture, which was merely a custom prevailing with regard to land held by military tenure, was not at the close of the twelfth century part of the law of England. Certainly the judges, apart altogether from their legal capabilities, had the most favourable opportunities of comparing the different local customs, and of selecting from amongst them what was best and most practical. Moreover, owing to the extensive experience which they gained in following the King about the country, they were thoroughly able to interpret the wishes of the majority. In this manner the Common Law soon became a regular branch of law administered according to fixed and recognised principles.

At the beginning of Henry III.'s reign, the three Courts were distinguished by the nature of the cases heard in each. The Exchequer dealt in theory solely with those which affected the Revenue; the Common Pleas heard suits between private persons—differing in addition from the other courts, through being, again in theory, permanently established at Westminster—and the King's Bench had jurisdiction over all matters at issue between the Crown and the subject. Its business, in fact, was composed of all that of the Curia Regis B, which had not been transferred to the other two Courts; and it had then, as it has now, power to remove proceedings from any lower Court, and supreme jurisdiction in criminal matters.

The rolls of the King's Bench or Curia Regis C, which appears to have followed the King till a much later period in history than any of the other Courts, begin in the reign of Richard I., and since then the whole series has been preserved. Like the Exchequer, it managed to extend its jurisdiction to a considerable extent. In reality, as already mentioned, it had jurisdiction solely with matters at issue between the King and his subjects. Consequently, it followed that all trespasses, as breaches of the King's peace, came before it. The usual legal fiction was then had recourse to. It was assumed by the Bill of Middlesex that the defendant in any action whatsoever was sued on a plaint of trespass, on which account he was taken in charge by the Marshal of the Court. But this only applied to the county in which the Court was then sitting. If, however, the defendant was not in that county, the Sheriff made the return "*non est inventus*," upon which a writ of *latitat*—abolished only in 1832—was issued to the Sheriff of the county in which he was residing, which stated that he "lurks (*latitat*) and runs about in your county," at the same time ordering his immediate arrest. Thus the defendant, who was not permitted to produce any evidence to disprove the trespass, was brought within the jurisdiction of the Court in question.

There are no legislative acts to fix the exact date of the final separation of the Courts. But it does not appear to have actually taken place until the abolition of the Justiciar's office was an accomplished fact. No doubt the process by which it was accomplished was gradual. At any rate under Edward III., the Judges who followed the King in his Council became gradually distinct as the Court of King's Bench. Thus the separation of the three Courts resulted in the withdrawal of the great officers of State from active judicial functions, their places from thenceforth being taken by professional lawyers.

As soon as the regular King's Courts were in working order the people discovered how much more even-handed was the justice there administered to that which they had been accustomed to in the local tribunals, and the business of the former increased proportionately. The appointment of three separate staffs of judges also became a necessity when each began to practise a distinct system of procedure. Each, too, in time came to be presided over by its own chief, who had under him three puisne judges, till in 1830 a fourth and in 1868 a fifth was added. But even after the establishment of the Courts on a permanent basis, the staffs of each were still paid by the King. So that the judges remained more or less under the royal influence. They were, however, made entirely independent by the Act of Settlement in 1701, which enacted that "judges' commissions be made *quam diu se bene gesserint*, and their salaries ascertained and established : and upon the address of both Houses of Parliament it may be lawful to remove them."

We have already seen that under Henry III. regular Courts of Justice were practically in being. But that King nevertheless still claimed the right of presiding personally in his own Courts, and in fact frequently sat and took part in legal proceedings. Not that this was in any way a novelty. Henry II. before him had often sat in person and delivered judgments ; and when Thomas á Becket, then Archbishop, was called to account for his disposal of the revenue during his Chancellorship, he stated in his defence that he had already been discharged of all his receipts and accounts by the King and the Barons of the Court of Exchequer. John also sat in person and decided causes ; and even so late as the fifteenth century Edward IV. actually sat in the King's Bench, though he does not appear to have taken any active part in the proceedings. The circumstances, however, had altered considerably

when James I. attempted to do the same. But no words can more fitly describe the situation than those which Sir Edward Coke delivered in the case of Prohibitions, which had the effect of settling the matter once and for all :

“ True it is, please your Majesty, that God has endowed your Majesty with excellent science, as well as great gifts of nature ; but your Majesty will allow me to say with all reverence that you are not learned in the laws of this your realm of England, and I crave leave to remind your Majesty that causes which concern the life, or an inheritance, or goods or fortunes of your subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it ”

In the reign of Edward III. the Court of Exchequer Chamber was formed, to which writ of error—as already mentioned—lay from the Common law side of the Exchequer. The members of the new Court consisted of the Chancellor and the Treasurer and the judges of the King's Bench and Common Pleas. From the Common Pleas, on the other hand, writ of error lay to the King's Bench and from thence to the House of Lords. But, as in troublous times Parliament did not sit regularly, it was deemed advisable to establish an intermediate Court between the two last named. So in the reign of Elizabeth a second Court of Exchequer Chamber was formed, in which judges of the Common Pleas and the Exchequer dealt with Queen's Bench cases. The two Courts were united in 1830, and from thenceforth heard cases from all three Courts of Common Law. This tribunal, consisting of judges of the two Courts other than the one from which the cause had emanated, was abolished by the Judicature Act of 1873 ; and the Court of Appeal, which was then created, now hears appeals alike from the King's Bench,

Chancery, and Probate Divorce and Admiralty divisions. By the same Act, too, all the Courts were united into one Supreme Court of Judicature, which was divided into a Court of Appeal and a High Court of Justice. In the original Act the first-named was to be the final Court of Appeal, the judicial functions of the House of Lords being thereby abolished. But that event never occurred, as before the provision in question had come into force, its judicial functions were restored by a subsequent Act. The High Court of Justice, by the first Act, was divided into five divisions—Chancery, Queen's Bench, Common Pleas, Exchequer, Probate Admiralty and Divorce. Power was, however, at the same time conferred upon Her Majesty to alter the divisions by order in Council, and by the same means to abolish certain judicial offices. After the death of Sir Fitzroy Kelly in September, 1880, and of Sir Alexander Cockburn in November of the same year, Her Majesty—by an order in Council dated 16th December 1880—abolished the offices of Chief Baron of the Exchequer and Chief Justice of the Common Pleas. At that time Lord Coleridge filled the latter post, and, as death had removed his two fellow chiefs, he alone was left.\* His appointment, therefore, as Lord Chief Justice of England solved the difficulty; and, after their long separation, the Courts of Common Law were once more united. Edward I.'s distribution of judicial work had thus endured for 600 years—a fixity almost unexampled in history—and there are still great authorities who maintain that his system was after all the best.

ERASMUS DARWIN PARKER.

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## VI.—THE DEMISE OF THE CROWN.

TOUCHING the effect of the death of the Sovereign upon the meeting and session of Parliament, and the avoidance of offices held under the Crown, the following comments are submitted. The Sovereign being regarded as the head of Parliament, *that* failing, says Blackstone, immediately upon the death of the reigning Sovereign, dissolution happened, and the whole body was held to be extinct. But the inconvenience of calling a new Parliament immediately after that event and the dangers of having no Parliament in being in certain contingencies, led to the passing of the Succession to the Crown Act, 1707,<sup>1</sup> by which it was enacted that the Parliament in being should continue for six months after the demise of the Crown, and that if at the death of Her Majesty, her heirs or successors, there should be a Parliament in being, but adjourned or prorogued, "such Parliament shall immediately after such demise meet, convene and sit, and shall act notwithstanding such death or demise." Additional provisions dealing with the case of such demise occurring coincidently with the time fixed for the meeting or the assembling of a new Parliament are contained in the Meeting of Parliament Act, 1797;<sup>2</sup> while by Stat. 30 & 31 Vict. c. 102, s. 51, notwithstanding anything in the Stat. 6, Ann. c. 41, "the Parliament in being at any future demise of the Crown shall not be determined or dissolved by such demise, but shall continue so long as it would have been continued but for such demise, unless sooner prorogued or dissolved by the Crown."

With regard to the holders of office and commissions under the Crown the Succession to the Crown Act, 1707, provides by section 8 that the Privy Council shall on the

<sup>1</sup> 6 Ann. c. 41.

<sup>2</sup> 37 Geo. III., c. 127.

death or demise of Her Majesty not be dissolved, but shall continue to act for six months unless determined by the next successor, nor shall the offices of Lord Chancellor, High Treasurer, President of the Council, Privy Seal, High Admiral, or any of the great offices of the Queen's household, nor any office, place, or employment *civil or military* within the British Islands or any of Her Majesty's plantations become void by such demise, but the holders of any such offices shall continue to hold the same for six months (eighteen months in the Colonies,) after such death or demise unless sooner removed.

In this connection reference may be made to the Demise of the Crown Bill, introduced by the Attorney-General in the present Parliament and which passed the second reading on April 2nd. By this measure, which is retrospective in its operation, it is proposed to render reappointment to any office, civil or military, under the Crown, entirely unnecessary, so that the holders of such offices will continue in them indefinitely as if the demise of the Crown had not occurred, instead of for the limited periods mentioned above. Under section 6 of the same Succession to the Crown Act, 1707, any person already chosen a member of Parliament (not being an officer in the army or navy accepting a commission), who accepts any office of profit from the Crown, is made to vacate his seat thereby. If the demise of the Crown Bill becomes law, and the paid ministers of the Crown, being under no necessity of reappointment to their offices after the demise of the Crown, are not reappointed, there will be no room for the contention recently put forward that by reappointment they have ceased to be members of the House of Commons; nor would there appear to be any necessity for a provision in the recently introduced measure similar to that in the House of Commons (Disqualifications) Act, 1813,<sup>2</sup> with

reference to the continuance in or reacceptance of office under successive Lords Lieutenant of Ireland that the seats of such ministers should not be vacated.

An earlier Act<sup>1</sup> provides against the determination by "Her Majesty's demise (whom God long preserve) or any of her heirs or successors" of various commissions and writs such as the commission of assize, commission of the peace, or writs of *habeas corpus*, attachment, etc.

The commissions of the Judges are continued on the demise of the Crown by Stat. 1 Geo. III., c. 23, and although the office of a Justice of the Peace is determinable by the demise of the Crown, under the Justice's Qualification Act, 1760, if the Justice is put in the commission by the succeeding sovereign, he is not obliged to sue out a new *dedimus* or to swear his qualification afresh.

The question as to the necessity for re-election in the case of Members of Parliament for Ireland, Scotland, and the Universities, upon the demise of the Crown appears to have arisen in this way. By the Reform and Redistribution Act of 1867, s. 51, it is provided that the Parliament in being at any future demise of the Crown shall not be determined or dissolved by such demise, but shall continue so long as it would have continued but for such demise, unless it shall be sooner prorogued or dissolved by the Crown, notwithstanding anything in the Succession to the Crown Act, 1707, contained<sup>1</sup>. But section 2 of the 1867 Act excludes Scotland, Ireland, and the Universities from its operation. If this section 2 has the effect of preventing section 52 being operative in the case of Scotch, Irish and University Members then apparently they continue members under the Act of 1707 for six months after the Crown's demise unless Parliament is sooner prorogued or dissolved. By the Union with Ireland Act, 1800,<sup>2</sup> Article 3:—"The said United Kingdom be represented in one and the

<sup>1</sup> 1 I. Ann. c. 2.

<sup>2</sup> 39 & 40 Geo. III., c. 67.



same parliament, to be styled the Parliament of the United Kingdom of Great Britain and Ireland." Again by the Union with Scotland Act, 1706,<sup>1</sup> the United Kingdom is to be represented by one parliament. Hence it was argued that there is but one Imperial Parliament for the United Kingdom although its Members represent different portions of that Kingdom, and that is "the Parliament" referred to in, and governed as to its continuance on the demise of the Crown by section 51 of the Act of 1867 referred to above. Furthermore it was contended by those who assert no election to have been necessitated by the demise of the Crown that there cannot be a dissolution of "the Parliament" partial only as to Scotland or Ireland.

W. PERCY PAIN.

## VII.—DEBT-SLAVERY IN THE MALAY PENINSULA.

IT is curious to know that, within the last fifteen or twenty years, there has been abolished, by British effort, a system which in many respects closely resembles the nexal debtorship of the antique Roman Law. The system is variously styled debt-slavery, slave-debtorship, bond-debtorship, and bondage; but it will be referred to in the following pages by the first of these names simply; except in quotation. The *local* of the practice was the so-called Protected States of the Malay Peninsula. Without finding it necessary to prove the binomial theorem at the outset of our investigations, it will nevertheless be of advantage to point out clearly "where these places are." Let us look for a moment at the map of Malaya.

The Malay Peninsula has at its southern tip the island of Singapore. Near its northern end—at the west side—is the island of Pinang. Both are British territory.

<sup>1</sup> 6 Ann. c. 11.

Between them, on the same west coast, are spots of British ground—Malacca, the Dindings, Province Wellesley. But these are comparatively small—the greater extent of the western side of the peninsula is occupied by Johor (which covers the whole southern extremity, east and west), Sungei Ujong (with the inland confederacy of Negri Sembilan), Sēlāngor, Pêrak<sup>1</sup>, and Kôdah. The east side (much the less known) contains, besides Johor, the comparatively extensive state of Pahang, with Kelantan (mainly inland) and Tring-galu (seaboard), to the north of it. Of these Pêrak Sēlāngor, the Negri Sembilan (with S. Ujong) Johor and Pahang are so-called “Protected States.” All are small countries, especially if the Malay population is alone considered. Pêrak may have as many people as Cumberland, but most are Chinese. Chinese to the number of 100,000 or thereabouts appear among the 160,000 inhabitants of Sēlāngor, and are equally in evidence in Sungei Ujong, if not in the other States of the Negri Sembilan. Pahang’s 70,000 or so—about as many as Westmoreland’s—are alone tolerably free from such admixture, but doubtless, as the country becomes more settled, this feature will rapidly change. Chinese tin-miners pour into the Peninsula literally by the hundred-thousand—or did, until the low price of tin, within the last two or three years, checked the stream; and though they leave in almost as large crowds, the resulting increment has been sufficient to make the Chinese the predominant population, and not the Malay.

The disorder consequent on this irruption of unsettled foreigners into Malay states totally unfitted to deal with them, was the occasion of British interference with the latter. But it is impossible to avoid the suspicion, reading between the lines of official despatches, that the motive of our action was to open up new fields to British enterprise—in less impressive language, to push British trade.

<sup>1</sup> The *k* is silent.

This is an aim which, we have it on right reverend authority, covers a good deal of the evils which uncivilised nations may suffer in the process of its execution. So that one is glad to find that it plainly was not absent from the thoughts of the authors of our interference. For instance, in the Legislative Council of the Straits, the Governor Jervois observed (after alluding to the slump in business caused by Chinese competition, and glancing with a prophetic eye at the miserable position of Singapore, if the future should bring in its lap, *inter alia*, a canal for the isthmus of Krao),—

“Forewarned is forearmed, and it is our duty to adopt such measures as will secure the permanent prosperity of the Straits Settlements, and if possible afford a vent for the great competition which is now so heavily weighing upon our countrymen who are engaged in commercial pursuits.

“Now, gentlemen, it seems to me that one remedy for the sources of anxiety to which I have alluded lies at our very door. Behind us runs the Malay peninsula, stretching to our Indian possessions on the Eastern coast of the Bay of Bengal; and it is to this peninsula that we must look for the field where British commercial enterprise can find a [*sic*] scope in these waters for its undertakings and speculations. . . . Why should not English capital be invested as readily in these rich states as it is in other parts of the world? . . . The answer can be given in two words—Malay rule.”<sup>1</sup>

It is curious that the Governor did not anticipate that Chinese competition would extend itself to these Elysian fields; and it is instructive to remark that, if any Caucasians have benefited commercially by our interference, it has been the Germans.

<sup>1</sup> Parliamentary Paper (1876) (c. 1505), L.IV. 76. It would be unfair to suppress the fact that civilisation and progress were accorded a complimentary allusion in the same speech.

On a previous occasion<sup>1</sup> a member of the Council had put it a little more bluntly, and with less ornate philosophy—

“Now I understand,” said this speaker, “that one of the great complaints in this part of the world<sup>2</sup> is this—that men do not make money in their business as they did, and expected to do, the reason being the competition in this place. Now, the one way to remedy that is to discover and open up fresh places of trade, and I believe that what you have done is the basis for extending the business of the Settlement and adding to the prosperity of the Straits.”

And another councillor<sup>3</sup> pointed with elation to Johor—where the adoption of British methods had sent up the revenue on opium and spirit farms 100 per cent.

What is to be done after the whole world has been opened up is not explained by persons who adopt this line of argument. Possibly they regard the human race as having only a very insecure tenure of the earth, and as justified accordingly in adopting hand-to-mouth expedients for a living.

It is noteworthy that a Dutch official, in addressing his own countrymen on British methods, which he most highly eulogised, took occasion to observe with commendation this characteristic of a keen eye to business:—“They would remark, *inter alia*, how the advancement of British trade is the chief aim with every government in the Straits or elsewhere where the British flag waves; and that every government official, however much he may talk of humanity and civilisation, devotes his attention in the first place to this.”<sup>4</sup>

Again, there was a good deal of endemic fighting in the Peninsula. One is often told that no nation

<sup>1</sup> P.p. 1874 [c. im.] XI.V. 257. <sup>2</sup> “And elsewhere”—he might have added. <sup>3</sup> Ibid, p. 257. <sup>4</sup> Mr. Kruyt; *apud Journal, Straits Branch, Royal Asiatic Society*, XXVIII. 43.

can tolerate the indefinite perpetuation of anarchy in its neighbourhood. It certainly seems as if nations did not try very hard. In this case we mixed ourselves up in the affairs of the Western States, notably in the case of Pêrak, where we took it upon us to depose one ruler, and to set up another, whom we afterwards put down again, observing that his election by native princes was on board a British vessel, with a man-of-war alongside, and could therefore hardly be termed regular. But this was after he had offended us very much, and had been proved to have participated in the krissing of the British resident—without, of course, being heard in his defence, which was an indignity to which we could not think of submitting an independent Sultan. At the outset of this interference we exacted from the Sovereign in question the signature of a very important document—the treaty of Pangkor: also signed on board that Government vessel, with her armed sister alongside.

By this treaty (1875) the Sultan agreed to receive a resident, whose advice was to be taken and acted upon (except in matters of Malay custom), and in accordance with whose advice the State was to be administered. A similar treaty was made, about the same time, with the ruler of Sungei Ujong, who solicited our interference to settle him on his throne, and with the ruler of Sêlângor.

From the very first this arrangement seems to have been interpreted, on the spot, as placing the whole administration of the States in the hands of the resident, who became the nucleus round which a staff of European officials gathered. Lord Carnarvon, then Secretary for the Colonies, struggled hard, when confronted with facts to the contrary, to preserve the theory that the resident's function was merely to advise, and that the carrying out of the measures recommended should be left entirely in the hands of the native authorities, who were to be gently

put in the way of learning to do without advice. But, in fact, the theory never corresponded with the practice for a moment. The supineness of the rulers, and their fear of the British arms, combined to make them respond, when advised that such and such an act ought to be done: "Very well; do it yourself—take my signature." And the administration was in every branch controlled by the British officials; which system has with every year taken additional solidity and extension. So that, in the year 1889, a resident could write (with reference to Pahang, which never had anything to do with the Pangkor treaty, one may incidentally observe) that, "By the treaty of Pangkor, under which are regulated the relations between the British residents and rajas of all the protected States, it is provided that each State shall be administered and its revenues collected by the resident, assisted by European officers, in the name of the raja."<sup>1</sup>

The airy assumption that the Pangkor arrangement had anything in the world to do with Pahang, and the apparent want of acquaintance with the terms of that contract displayed in this curious statement, are remarkable enough, but they show with sufficient clearness the conceptions entertained by officers on the spot of the status of the sultans to whose courts they are accredited.

Of this system, and of the position of a resident under it, it has been said by a high official of the Straits, that "it may safely be affirmed that . . . the power for mistakes, for extravagance, for favouritism, or for what can be described as bullying, is more than should be placed in any single hand."<sup>2</sup>

But as long as the Earl of Carnarvon was at the Colonial Office, this extension of the scheme apparent

Parliamentary Papers (1889, C. 584), LVI. p. 92, Encl. in despatch of 11th June, 1889.

<sup>2</sup> *About Pérak*, p. 18 (Sir F. A. Swettenham).

on the face of the treaty was never recognised. Sir Benson Maxwell, therefore, went rather too far in writing,<sup>1</sup> as an ex-Chief Justice of the Straits, that Lord Beaconsfield's two Colonial Secretaries sanctioned slavery by absolute and active enforcement through their own officers in States "under their absolute management and control." If Pêrak was ever under Lord Carnarvon's absolute management and control, Lord Carnarvon did not know it. As has been said, however, the local officers and the Singapore Government assumed an authority which the Imperial ministers refused to exercise.

Accordingly, Sir F. Weld, writing to Secretary Holland in August, 1887, refers plainly to the system as "*our* administration."<sup>2</sup> And Mr. H. Clifford, a former resident of the highest experience, sardonically remarks on "protection—one of the euphemisms for annexation."<sup>3</sup>

There was one notable exception, for a few months, to this state of things. Pêrak waited ten months for its resident, and when he came, his endeavour to carry out Sir Andrew Clarke's policy of virtually taking over the administration of the country met with considerable opposition. It is really impossible to say how far he actually carried that system into practice. He complains in his diary about the difficulty of getting the Sultan to do anything. But it also seems that he personally found it possible to do a good deal—whether on his own authority, or otherwise. Unfortunately, he was inclined *brusquer les choses*. He regarded himself as the virtual ruler of the State, and Sultan Abdullah as a drag on the wheels of government. Interpreting the Pangkor engagement with the pedantic literalness required by the official Straits theory, he took the

<sup>1</sup> *Times*, March 25th, 1882; quoted, Parliamentary Papers, 1882 [c. 3429], XLVI. p. 22.

<sup>2</sup> Parliamentary Papers, 1888 [c. 5566], LXXIII. p. 3.

*In a corner of Asia*, p. 8.

general agreement to act in accordance with the resident's advice, which had been entered into by the Sultan, as meaning that the Perak authorities had become puppets, existing solely to register the Singapore Government's decrees. And this function he required them to fulfil with promptitude and despatch. They had agreed in general terms to act upon his advice—he insisted on their complying with his specific demands. They thought they had gained a counsellor—they found that they had got a master.

The iron hand wanted the velvet glove. In the select confidences of his diary, the resident was accustomed to cover with the most uncomplimentary epithets the Sovereign to whom he was accredited. That gentleman's has surely been the most variously interpreted of all historical characters, not excluding Hamlet's. Looked upon with disfavour originally, as mentally and physically unfit to rule, it was found, when he became a convenient candidate for the throne of Perak, that it was only necessary to be in his company for a few minutes to see that this was an erroneous opinion. It was discovered that he not only looked well in health, but that he was alert, and, for a Malay prince, more than ordinarily sharp and intelligent—that he managed his *entourage* with perfect ease, and proved himself an able negotiator.<sup>1</sup> He also, according to one of the witnesses against him, possessed the useful and uncommon faculty of turning himself into a spirit. Scarcely was he seated on the throne and developing unofficial views on the interpretation of the treaty of Pangkor, before the Resident began to write of him, in an engaging strain of friendship, as "The Baby at Batarabit," "a vain little idiot," "really and truly only fit for a doll, or one of those figures at a tailor's shop to show off coats" The Mr. Hyde in Abdullah continued to develop until "his imbecility and want of character were

<sup>1</sup> P.p. 1874 [c. 1111] XLV 169.



manifest at every turn" to Sir Wm. Jervois,<sup>1</sup> who naturally dismissed him as "utterly impracticable." Finally his wickedness culminated in events which led to his involuntary visit to the Seychelles. There, however, and in Mauritius, he won golden opinions from all classes of officials and residents, which were embodied in testimonials which could not have been improved upon had he been seeking an appointment as clerk to a Board of Guardians. Singapore, however, modified its views with slowness, and the governor in 1886 observed that Abdullah, who was anxious to be repatriated, had better remain at the Mauritius, "where he seemed to be so much better appreciated."

This is to anticipate events. Let us return to Abdullah's brief career as Sultan. The Hon. C. J. Irving, who was the only dissentient in the councils of the Straits Government from Sir A. Clarke's and Sir W. Jervois's forward movement, had already stated in a memorandum that—"The Malays are generally a lethargic sort of people, much addicted to a blind following of the 'customs of the ancestors'; then they are a nervous, shy, sort of people, and withal very touchy and ceremonious, and with high notions of their own dignity. And, given such a people, and put down among them a European officer, whose sole duty it would be to be giving good advice, after a short time I should expect to find a feeling of worry and annoyance and exasperation springing up in the minds of the chiefs against this perpetual visitor and his perpetual advice, however wise the advice might be and however discreetly given."

As we have seen, the Resident did not limit himself to giving good advice, but busied himself in enforcing it and seeing that it was put in practice. An immediate consequence was the establishment of the worst possible state of feeling in

<sup>1</sup> P.p. 1876 [c. 1505] LIV. 74. 33.

<sup>2</sup> P.p. 1874 [c. 1111] XLV. 219.

the country. The nervous, "touchy" Malays were irritated into a constant state of apprehension and uncertainty. They found that the Resident claimed the right, under colour of tendering advice, "which must be acted upon," of interfering in every detail of government, and they could not tell how far such interference would be pushed. Already the Resident had pressed for the abolition of debt-slavery, called by Swettenham—"The practice most valued, most tenaciously clung to by every one of rank, of means, or influence, in the country."

Doubtless their uneasiness confirmed the Sultan in his dilatory ways of dealing with the Resident. A fresh step was necessary in the "forward policy." The new governor of the Straits, Sir William Jervois, extorted from Abdullah his sanction to a new arrangement, by which the Sultan was formally to accept the position which it had been expected he would have been content to occupy—that of a salaried mouthpiece of the Straits government. Pêrak was thenceforth to be administered by British officers in the name of the Sultan. Sir W. Jervois invented for these the fancy titles of "Queen's Commissioners." Annexation, pure and simple, had been hankered after as an alternative. Even in 1874, a speaker in the Legislative Council, after remarking that the population of the Peninsula was only seven to the square mile, had *naïvely* observed, "Surely, sir, a country like that is very easily taken and put under the British flag"! It is difficult to speak with patience of the reasons officially assigned for rejecting this piratical course, and they deserve a fresh paragraph.

"In carrying on the government of the State at present, it would be very inconvenient if the inhabitants of Pêrak all at once became entitled to the rights and privileges of British subjects. On the other hand, by ruling in the name of the Sultan, the form of government will be more adapted to the conditions of the case, and will enable us to

deal easily with matters that might be difficult of solution<sup>d</sup> under English law."

That is to say, the Malays were expected thenceforward to conduct themselves in accordance with English ideas, and, at the same time, were refused the protection of English law !

An age which is addicted to short cuts to perfection, and which is under the impression that the benefits of a position can be easily enjoyed without its responsibilities, sees no anomaly in such arrangements. Nations blockade their weaker neighbours, pretending to be at peace—it is so easy ! Troops are landed in friendly territories and occupy custom-houses or pillage capitals—it is so convenient ! There is a Nemesis, nevertheless, which waits upon such acts of international anarchy : and it is difficult to believe that there will not be trouble in the future, arising out of the altogether absurd and anomalous position of dependent states. Where one state is entirely under the domination of another, as Cuba is under the North American Federation, or as the Confederation of the Rhine was under Napoleonic France, it is a dangerous delusion to speak of it as 'independent.' For these Malay States whose policy we control, we are responsible. We have, and we exercise, the power of governing them. They have probably lost the right of appealing to the world to judge between themselves and us. They are entirely at our disposal, as much as Ireland. Surely it is a necessary corollary for a freedom-loving nation, that they should at least share the protection of our law. Yet the courts in England, with that deference towards the Government which is one of the most disquieting features of our time, accept the Foreign Office certificate that a country is independent, without so much as inquiring what "independence" in the official sense means. In other matters, the

courts are not apt to be played upon with words, and to take the shadow for the substance. It is obvious that where there is actual British supremacy, its exercise ought to be controlled by British law. And the courts which administer that law ought not to be deterred from enforcing this principle in the case of states which are not really independent, merely because a government department chooses to give them that name. The essential condition of the application of British law is that the place should be effectively under the power of the British Crown.

Sir Wm. Jervois and his advisers, however, thought it was possible and desirable to elude the principle that British authority means British law, by a nice arrangement of epithets. The annexation was to be virtual, not overt. The administrators were to be in a position to avail themselves of the despotic powers of a Malay raja. They were to keep one on the throne, to maintain the fiction of independence, by which alone such a state of things could be supported. But he was to be a piece of machinery, designed to effectuate this particular purpose.

In pursuance of this new departure, which was carried out without communication with the Imperial Government, the resident proceeded to post up proclamations, whose tenor was that the country would thenceforth be administered by British officials in the name of the Sultan. The result was to aggravate enormously the bad feeling that prevailed. Lord Carnarvon subsequently, on a full review of the circumstances, concluded that "the existing discontent, which probably had its origin in the assumption by the residents of an authority in excess of that which had been contemplated by H.M.'s government when the Pangkor engagement was approved, was materially increased by the mode in which Sir W. Jervois induced the Perak chiefs to give an involuntary assent to a system

which deprived them of their privileges and powers."<sup>1</sup> Under these circumstances, the Resident decided to proceed to a remote town, which had never even acknowledged Abdullah's authority to post up his proclamations. His Sikh guard quarrelled with one of the inhabitants over the business; a fracas ensued, and he himself was fatally stabbed in his bath.

The first view the Straits Government took of this occurrence was that it was an unpremeditated affray.<sup>2</sup> The population of the peninsula are of a highly-strung, nervous temperament, which disposes them very easily to lose control of themselves. In some individuals—(in fact, a large proportion)—this predisposition is carried to excess, and the subject can be thrown by a sudden word or gesture into a state in which he will perform any absurd and dangerous action which may be suggested by the bystanders. Such a person (called *latu*) is frequently the *amok*-runner of travellers. The intruding soldier posted his proclamation: the village constable tore it down. Nothing was more likely than that the violent excitement which naturally arose should excite the peculiar frenzy in question, nor that the Resident should have been one of the victims of it.

But the Straits authorities, alarmed by the unrest which it was now plain was deep-seated in Perak, and apparently under the impression that the very safety of Pinang and Singapore was in danger, gave ready credence to reports which put an uglier complexion on the matter. The conspiracy, which came to be officially believed in, was supposed to be a fatuous plot against the Resident's life, concocted by Abdullah and deliberately executed by the village chief of Kota Lama. Singapore still clung to the persuasion that there was nothing that could possibly have

<sup>1</sup> P.p. 1876 [c. 1503] LIV. 29. Despatch of May 20th, 1876.

<sup>2</sup> P.p. 1876 [c. 1505] LIV. p.p. 25, 59.

caused uneasiness in Sir W. Jervois' inspiration of assuming the formal government of the country—which was no more than what was meant from the first, only put into set words. So it attributed the horrid plot, whose executants received their victim in peace at night and despatched him by an afterthought in the morning, to a "bad state of feeling engendered by necessary reforms . . . and fear of abolition of debt-slavery."<sup>1</sup>

This last word needs a line of explanation. Debt-slavery, as we shall see, rested on Malay custom. And Malay custom was expressly exempted from interference at Pangkor. But it seems that we rather thought it our province to explain to the Malays what Malay custom was, and we more than hinted that the custom of debt-slavery, as practised in Perak, was not genuine old Malay—and therefore, not Malay custom at all.

What the truth was in respect of the alleged plot, so childishly contrived, and so clumsily carried out, it is impossible to ascertain. At the most our verdict must be—"Not Proven." In her lively work, *the Golden Chersonese*, Miss I. Bird balances the views of Major McNair and of the late Chief Justice of the Straits Settlements (Sir P. B. Maxwell) on this and other matters relating to our dealings with Malaysia. But Major McNair's *Sarong and Kris* is merely a popular account of the peninsula and its history—pleasantly written, but standing on quite a different plane from Sir P. B. Maxwell's *Our Malay Conquests*, which is a subtle and exhaustive examination of the probabilities and the evidence. Most people will prefer the judicial conclusions of the Chief Justice, arrived at after minute analysis of the events, to the statements of the Colonial Engineer, which make no pretensions to be more than an *ex parte* account of what passed, in the light of the

<sup>1</sup> Printed in accordance with telegraphic usage, "dead," in the Parliamentary Paper.

<sup>2</sup> P.p. 1876 [c. 1505] LIV. p. 59. See also p. 159.

Government theory. McNair's book, nevertheless, is well worth reading, from the traveller's and ethnologist's points of view.

In pursuance of the mystic policy which demands that Great Britain shall visit the consequences of her mistakes upon the victims of them—known, we believe, as the policy of "putting it through"—troops were immediately sent to Pérak in imposing quantities at the call of the Straits Government. The expedition was beautifully equipped and remarkably successful—except, Sir Benson Maxwell remarks, in finding any enemy to fight. A sort of rival sultan to Abdullah was the *de facto* supreme authority in the territory where Passir Sala was situated; and he and his followers judiciously disappeared. The immediate chief of that village, with two companions, likewise evaded capture. Emissaries reached them from the maharaja of Johor, when quiet had been restored; and they emerged from their retreat, where they had been secure in spite of the rewards of 6,000 dols., 3,000 dols., and 3,000 dols.—immense sums in Malay eyes—which had been offered for their capture, on a safe-conduct being granted them to visit Johor "to see Sultan Ismail and the Maharaja." The safe-conduct expressly guarded them against European molestation, until they were safe in Johor. Nothing, it is true, was said about their not being prosecuted or handed over to their enemies, because all such considerations were entirely outside the scope of the transaction. The safe-conduct was given to enable them "to see Ismail and the Maharaja"—not to enable them to put themselves at the disposition of the latter. Ismail was the rival sultan, above alluded to, who had sought and received an asylum at the Johor Court. The chiefs who accepted the safe-conduct no doubt expected the same hospitality. It may not have been expressly promised to them: the Johor emissaries denied that it was, and we

need not disbelieve their assurance. But there is no reason to suppose that the chiefs ever dreamt that such a promise was necessary—they were going to Johor “to see Ismail and the Maharaja.”

Will it be believed that we pressed the literal words of the document—“they will be quite safe and in peace *until* they are landed in Johor”—against these Malays, and allowed the ruler of Johor to surrender them into our hands? That we immured them in jail; that we took them to Pêrak, and set up the simulacrum of a native court to conduct a trial which the Chief Justice Maxwell styles “a burlesque on justice which can only excite pain and humiliation in all impartial minds”<sup>1</sup>; that we set up as chief judge over them Yusûf, who had urged the late Resident on at least one occasion to “make an example” of the accused, and will hereafter claim attention as the person who was alleged to have put an ant’s nest and boiling water on the back of a recaptured slave; and that we finally killed them in the usual barbarous fashion?

Sir P. B. Maxwell draws a parallel between this proceeding and that of the moss-trooper who promised a prisoner to see him safely in England, and carried out his engagement by crossing the Tweed with him and straightway bringing him back to Scotland and despatching him there. He proceeds, speaking of the principal accused

“That Malay did no more than what any Englishman would have done in his place. He did his duty to his sovereign in resisting an attack on his sovereign’s rights; and though words of disgrace and horror may be heaped upon his grave, the time will come, if it has not come already, when his fate will leave very different feelings

<sup>1</sup> *Our Malay Conquests*, page 85.

NOTE.—It is true that they waited until after the “trial” without saying any thing about their having been led to expect immunity; but in the totally unfamiliar circumstances in which they found themselves this is scarcely surprising. They were ignorant of English and of English ways, and may well have thought “least said, soonest mended.”



from pride or satisfaction in all who value the fair fame of our country."<sup>1</sup>

The name of this Maharaja was Lela. His only monument at present is Maxwell's eloquent tribute. The Jacobites waited a century for their statues; the fallen chief of Pêrak need not murmur in the shades if theirs is not yet sculptured.

Abdullah was lucky in not meeting the same end. The theory of the existence of a set conspiracy being now firmly established in the Singapore mind, the Sultan was summoned to that city to explain matters. It is abundantly clear that he and all his rajas would have been extremely glad to get rid of the Resident; and there was any amount of evidence which really went no further than this, but which was capable of being regarded as strong corroboration of their views by people possessed by the phantom of unholy plots, supported as it was by some direct testimony. The Sultan and two or three other high officials who were associated with him denied everything categorically. They were too independent of Great Britain to be confronted with their accusers. But they were not too independent to be forthwith deported to the Seychelles.

There they remained for fifteen years, when Mr. Henniker Heaton prevailed upon Viscount Knutsford to assent to the view that no danger would arise from their return to Singapore. Abdullah has consistently refused to admit any complicity in the death of his Resident—and, indeed, it seems absurd that such a step should have been taken at a time when he had just been appointed to be no longer Resident, but joint "commissioner" with a Mr. Davidson, who was well known and liked by the Malays. The question of Abdullah's return had seriously occupied Colonel Stanley's attention in 1885.

<sup>1</sup> *Ibid.*, page 108.

He had requested the Straits Government to furnish him with their views; and the then Governor had produced in triumph, for the first time, two orders under Abdullah's hand and seal, directing the death of the Resident. The Secretary of State dryly remarked on the belated appearance of these compromising documents—and they seem really to have been specimens of the blank forms, bearing the genuine State *chaup* or seal, which were kept and issued by the Sultan to his officers for official use, like stamped paper. The Governor further quoted, for the Secretary's benefit, the statement of "a Malay chief, a man of the highest rank and character," who had "lately affirmed that Abdullah's guilt was incontestable." Colonel Stanley, perhaps, was not much impressed by the testimony of this anonymous magnifico. He did not accede to Abdullah's request to return, but the Colonial Office was apparently somewhat struck by the unsatisfactory nature of the case against the ex-Sultan; and as already stated, the latter was returned in 1891 to Singapore, though not to Pêrak.

In Sêlângor and Sungei Ujong no such difficulties arose. Sêlângor had been virtually depopulated, and the docile Sultan was a willing instrument in the hands of his advisers. The Datu Klana, the ruler of Sungei Ujong, was no less ready to further the views of the Resident. Circulars were sent out, in 1876 and 1878, to the Residents impressing on them the information that they were advisers merely and not rulers. The Home Government had insisted so strongly, after the Pêrak disturbances, on this being made clear, that the Singapore authorities could not decently do less. But they did not succeed in doing more—perhaps they did not try to do more.

Here it may be proper to say that by no word would one wish to diminish the credit justly due to officers like Low, Murray, Lister, and others still in active employment, whose behaviour in the delicate circumstances in question

has been beyond all praise, conciliating native sentiment, and introducing at the same time enormous improvements. It would not be becoming to expatiate on the value of officials who are still in harness. But it is enough to say that there is probably no better Civil Service existing.

Their work eventually induced the shy people of the Negri Sembilan to accept a Resident. Previously they had been so averse to foreign interference, that they uniformly turned back travellers. "Where the needle comes," they sensibly remarked, "the thread will follow." This was in or about 1886.

In 1888 a Chinese British subject was killed at Pekan, the chief town of Pahang. This was the occasion of correspondence, which ended in the Sultan's rather pitiable letter asking for a Resident.

"Our enlightened friend, the Maharaja of Johor,"<sup>1</sup> the devotion to British interests of at least one of whose predecessors is well known, has succeeded in avoiding the appointment of such an officer, and the administration of the State appears to be in his hands. You cannot treat a sovereign who writes to you "My dear Governor," in quite the same way as is proper when he is obliged to adopt the quaint forms of Oriental politeness, and addresses you as "our friend" in the third person.

The States (Johor included) were federated in 1895, and a Residen-General appointed, who does not seem to interfere in the administration of particular States. The present able and tactful occupant of the post is Sir F. A. Swettenham, whose work must shortly be referred to.

When British officials, under the circumstances which have been above detailed, went to reside in the Protected States, they found a system existing which scandalised them extremely. This was in the early seventies, it must be remembered. Moreover, they found it first at its worst—

<sup>1</sup> P.p. 1876, LIV, p. 77.

in Pêrak. This was the system, already incidentally referred to, of debt-slavery. "The Malays," observes Sir P. B. Maxwell, "did not, like the fathers of their civilising friends, build jails and immure those who owed money for a term which might be life-long, at the discretion of their creditors; but their customary law, engrafted on the Mohammedan, gave the creditor the right to the labour of the debtor, who became his bondsman. Forgetting . . . that their own fathers had long maintained a much more hateful form of [slavery] for the good of trade [the new authorities] were for putting down the evil with a high hand, in breach of their own engagements."<sup>1</sup> Converts are always so enthusiastic! Captain Speedy, the Assistant Resident stationed at Larût, wrote<sup>2</sup> in language of which the emotion overwhelms the grammar—

"One terribly unjust and cruel custom, which from the earliest times has existed, and, I regret extremely to say, still exists throughout Pêrak and Larût, may be given as an instance of the imperfections of Malay rule. It is that called *barutang*, or slave-debtor.

"A Malay, on being unable to pay a fine to which he may be sentenced, becomes the slave of his creditor for years, perhaps even for life; for the special injustice consists in the fact that, even should he be subsequently in a position to pay for his ransom, the creditor is not bound to receive it; and should the money not be paid, although the debtor is willing and able to pay it, not only himself but his family and descendants become slaves for ever to the creditor and his descendants.

"Another phase of the custom, more grossly wicked, possible, than that above described, is that, should a man have borrowed money for a given time, and be at the

<sup>1</sup> *Our Malay Conquests*, 3. (1878: King, Westminster.)  
P.p. 1875 [C. 1320]. LIII. p. 76.

expiration of the period unable to pay, he and his family in like manner become debtors [slaves?] for life.

“One instance of this custom may suffice—.”

Captain Speedy then relates a story retailed in a somewhat condensed form by Miss Bird.<sup>1</sup> “The aunt of a Malay policeman in Larút, passing near a village, met an acquaintance, and taking a stone from the roadside, sat down upon it while she stopped to talk, and on getting up forgot to remove it. An hour later a village child tripped over the stone and slightly cut its forehead. The placing the stone in the pathway was traced to the woman, who was arrested and sentenced to pay a fine of 25 dols., and being unable to pay it, she and her children became slave-debtors to the father of the child which had been hurt.

“I sent to the village to inquire correctly into the case, and found it exactly as the man had stated, and, moreover, I discovered that this was an instance in which the creditor wished to exercise his prerogative of claiming the family as his rightful slaves instead of accepting the fine, for he repeatedly refused to do so—even when it was offered; and it was not until I threatened him severely that he consented to accept it.

“I beg to state that this circumstance took place before I accepted service under H.M. Government in Larút; but the custom still exists, though I earnestly hope it may soon be a thing of the past.

“The Oriental custom by which a debtor becomes the slave of his creditor until he has liquidated his debt may be admissible; but that this should degenerate into the possibility of enslaving a whole family, and not only for an error, but for accidents which, like the above, [?] may happen merely through mischance, is a most unwarrantable perversion of the term ‘justice.’

"In this manner about three-fourths of the Malay population are bound over to the remaining one-fourth."

In this early mention of the custom there are, as was natural, some inaccuracies. Two monographs, by Sir F. A. Swettenham<sup>1</sup> and the late Sir W. E. Maxwell<sup>2</sup> (then Mr. Swettenham and Mr. Maxwell), respectively, give more detailed and accurate information, which may be supplemented by a despatch<sup>3</sup> from the Pêrak Resident to the Secretary of Singapore, dated 28th July, 1875.

In Malay society the bulk of the people are poor. The wealth is concentrated in the hands of the rajas, who by means of forced loans would soon despoil a subject of any extra riches he might acquire. Consequently, any want of money makes it necessary for a subject to apply to the raja for funds. The loan is well secured. If unable to pay back the goods or money, the debtor is foreclosed upon by the creditor, and is "liable to be taken up (not by any process of law, but *motu motu*), treated as a slave, and made to work in any way that the creditor chooses: the debtor's earnings go for nothing, but are the property of the creditor, who gives no wages for the work done, and allows no credit towards the reduction of the debt."

One might almost be reading a commentary on the Roman institution of nexal indebtedness. As, for instance, Muirhead tells us:—

"The right of a nexal creditor, whose debtor was in default, was at his own hand, and without any judgment affirming the existence of the debt, to apprehend him, and detain him, and put him to service until the loan was repaid."

<sup>1</sup> The proportion was really very much lower.

<sup>2</sup> Pp. 1882 [c. 342] xlv. p. 9.

<sup>3</sup> Ibid. 1882 [c. 342] xlv. p. 16.

<sup>4</sup> Pp. 1882 [c. 342] xlv. p. 6.

<sup>5</sup> Ibid.

<sup>6</sup> *Roman Law*, p. 153.

The same writer says:—

"The circumstances of the poorer plebeians were such as to make it almost impossible to avoid borrowing. Their scanty means were dependent on the regular cultivation of their little acres, and on each operation of the agricultural year being performed in proper rotation and at the proper season. But this was every now and again interfered with by wars, which detained them from home at seed-time or harvest, practically rendering their farms unproductive, and leaving them and their families in straits for the commonest necessities of life. A poor peasant, in such a case, had no alternative but to apply to a capitalist for a loan either of corn or money. . . . It was not to be had without security. . . . failing all [else] the debtor had to yield himself to his creditor in *de facto* servitude *per aces et libram*. And, again—"Not content with the slave's work he exacted from his debtor, the creditor too often treated him as if really and truly a slave, and not a Roman citizen. . . .

"To such a height did the system grow, that often these free bondmen might be reckoned by thousands, and that the saying was almost justified that every patrician's dwelling had become a private prison-house. [Livy, vi. 36.] For it so happened, owing to causes already explained, that for a long time it was almost exclusively in patrician hands that capital had accumulated, so that they were the lenders and oppressors, and the poor plebeians the borrowers and oppressed."

T. BATY

(To be continued).

# VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

## Manchuria.

The Anglo-German Convention of last October—which it was hoped might be a means of securing the territorial and political integrity of China—has not had long to wait for an opportunity of shewing whether it can prevent one member of the concert of Powers from taking isolated action in order to obtain exclusive territorial and trading advantages for itself in Chinese territory; for such must be admitted to be the effect of the negotiations between Russia and China with reference to Manchuria, whether a temporary or a permanent arrangement is contemplated. The wording of the Convention is wide enough to apply to Manchuria no less than any other province of China; and although it has been stated on behalf of the German Foreign Office that Manchuria is excluded from the scope of the agreement, and that consequently the contingency does not arise upon which the contracting parties are to be at liberty to consider how they can protect their interests, and this view seems to be shared perhaps reluctantly by our own Foreign Office, Japan has declared that she reads the words of the treaty in their fullest application. The United States have also already declared to all the other Powers, who have been taking joint action in the military expedition to Peking and the negotiations now proceeding there, that they consider it inexpedient for the Chinese to make any independent arrangement with any foreign Power while those negotiations are in progress.

The chief interest accordingly of the two recently issued Blue Books (*China No. 1* and *No. 2*, 1901) lies in the declarations and actions of Russia with regard to China from the outset of the troubles. In July last, Count Lamsdorff



stated that the policy of Russia in dealing with the situation created by the anti-foreign outbreak in China was in complete agreement with the fundamental principles already accepted by the Powers as bases of policy towards China, namely: (1) maintenance of the union between the Powers; (2) maintenance of the existing system of government in China; (3) exclusion of anything that might lead to the partition of China; (4) the re-establishment by common effort of a legitimate central government capable of assuring order and security by the country. A little later the Russian Foreign Minister opposed the suggestion of Japan being given a "mandate" for independent action at Peking which might found a right to an independent solution or other privileges.

On July 20th the British Foreign Office was informed by the Russian representative that the <sup>vi. v. ant</sup> Government regarding "the ulterior <sup>for, the</sup> ~~mil~~ <sup>uly a slave,</sup> which may eventually have to be taken, that there should be unity of action between national detachments of troops in Chinese territory. These subsequent explanation showed to be Pechili <sup>that the</sup> ~~that~~ elsewhere each Power could act for itself where its interests are concerned, e.g., Russia would take independent military action in the north of China bordering on her own territory and the railway. On August 8th the Russian troops occupied Niu-chwang (a treaty port), and took over the administration; but this was stated by Count Lamsdorff to be only a temporary measure, and the Russian representative here informed our Foreign Office that although the progress of events had forced Russia to occupy Niu-chwang and to send troops into Manchuria, as soon as the country was pacified they should be withdrawn, provided that such action did not meet with obstacles caused by the proceedings of the Powers. Again, on September 10th and on February 6th, the

Russian Foreign Minister renewed his previous assurances to the British Ambassador that Russia had no intention to take advantage of the present crisis to extend her territory and influence at the cost of China by permanently occupying territory on the right bank of the Amur, and declared that Russia had neither made, nor was making, any permanent arrangement or convention with China which would give Russia new rights and a virtual protectorate in South Manchuria, but that a *modus vivendi* was being arranged between the local Chinese civil authorities and the Russian military authorities there.

In spite of these categorical assurances there are circumstantial rumours of negotiations between Russia and the Chinese Government, in which concessions of exclusive police or military rights in Manchuria and exclusive trading rights in the Russo Chinese frontier provinces are demanded, which, coupled with the actions of the Russian military authorities in occupying and administering Manchuria and questioning the right of British men-of-war to visit the Blonde islands in the Gulf of Pechili, may well cause suspicion of a virtual Russian protectorate being established over Manchuria. The modern protectorate differs in very little from territorial sovereignty, now that protecting states generally claim the right to administer justice to all persons including subjects of other states, and to treat the territory as their own for most purposes as regards other Powers. If other Powers follow suit, the commercial treaties may become valueless by the partition of China into exclusive spheres of influence. But, after the expressed adherence of the Powers acting in concert at Peking to the principle of maintaining the territorial integrity of China stated in the Anglo German agreement, any one or more of those Powers would seem to be acting within their rights if they should

adopt the line of policy suggested by the circular note of the United States Government, and if on the ground of that common principle and the common commercial interests of the world in China they should refuse to recognise the validity of any arrangements made between any one Power and China until the future position of China towards the Powers collectively after the recent outbreak has been settled. Similar action by Great Britain in 1878 at the end of the Russo-Turkish war obtained the settlement of the Eastern question at the Congress of Berlin ; and a similar general international arrangement might secure the peaceful development of China on the basis of the "open door" policy—which is merely upholding the treaty rights already existing.

### **Submarine Cables.**

In view of the already vast system of submarine telegraph cables, and the undertakings of a British Pacific cable and a French Marseilles-Algiers cable, it may be worth while to recall the fact that the safety of these cables in war has no guarantee in International law beyond the resolutions of the Institute of International Law adopted at their Brussels Conference in 1879, namely, that submarine cables uniting two neutral countries should be held inviolable, that it is desirable that when telegraphic communication by their means has to cease owing to a state of war the belligerents should strictly confine themselves to measures necessary for preventing the use of the cables, and that such measures should cease or their consequences be made good at the earliest possible moment after the cessation of hostilities. In the course of the discussion at the Conference it was declared impossible to neutralise such cables or to guarantee their safety in war farther than this, as the exigencies of war might require interference with cables connecting two

territories of one belligerent or the territories of the two belligerents, and cables connecting one of the belligerent countries with a neutral country would be open to the same danger. It will be remembered that the American Admiral in Cuban waters in the recent Spanish-American War placed the end of a cable on board his ship in order to control its use, and the British fleet did the same before attacking Alexandria in 1882. Ten years before the Institute considered the question, the United States Government had framed a project for the protection of submarine cables, which was to be of equal force in a state of peace or war, and had invited the other Governments to attend a conference (which, however, did not take place) for its consideration.

The Submarine Cables Convention of 1884, to which all the leading powers were parties, mainly proceeded on the lines suggested by the Institute; and, as a result, in peace time these cables are protected not only by International law, but also by the municipal criminal law of each country adhering to the convention. By its fifteenth article, however, the convention expressly declared that it did not in any way restrict the freedom of action of belligerents; the British representative, in signing it, declared formally that this meant that in time of war a belligerent signatory of the treaty would be free to act as regards such cables as if the treaty did not exist; and the Belgian plenipotentiary made a similar intimation.

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At the (abortive) Brussels Conference of 1874, convened to consider an international understanding with regard to the laws and customs of war, the Danish delegate had suggested that *cables d'atterrissage* (or cables connecting submarine cables with land telegraphs) should be included in the category of moveable

property suitable for military purposes, comprising railways, telegraphs, etc., which a belligerent occupying the country could appropriate and use on condition of restoring them at the restoration of peace; and at the Hague Conference the representative of Denmark renewed this proposal, which was supported by the special committee. Our Admiralty and War Office, however, on being consulted, expressed views contrary to the addition, the latter regarding it as unnecessary because a dominant military power by land could already control the landing places of the cables and because the subject would be better dealt with in connection with an international understanding with regard to submarine cables. Accordingly, on the subject coming before the Conference, the British representative objected that this was a naval question, and, therefore, beyond the scope of the Conference, and at his request the Danish delegate withdrew the proposal; but he declared that his Government remained convinced that there were sound reasons for giving to submarine cables the same protection as land telegraphs enjoyed, and the Roumanian representative expressed the same view.

The code of International Law, drafted by Mr. David Dudley Field, contained a provision that submarine cables, so long as not used for military purposes should not be the objects of hostilities, and must be protected by each belligerent to whomsoever belonging; and when a cable was projected from Europe to South America, France, Hayti, Brazil, Portugal, and Italy signed a convention in 1864 engaging that it should be inviolable in war no less than in peace. It might no doubt be impossible to debar by convention a belligerent from interfering with these cables when there is a military necessity for him to do so; but if the limited protection granted to land telegraphs were extended to them, they could be used by the belligerent in

any way necessary for the purposes of the war, while there would be an obligation to restore them at the return of peace. If they were made inviolable on the high seas, and at their various landing places were considered as land telegraphs, a belligerent could then prevent an enemy using them for his own purposes, and any injury done to them could be more easily repaired. Nor is it likely that a naval power would lose by this becoming law, for it is doubtful whether any fleet however large could prevent an ocean cable being cut at some point of its course.

### **The Hay-Pauncefote Treaty.**

As was anticipated, the British Government has rejected the United States Senate's amendments to the Hay-Pauncefote treaty, and the treaty lapses for want of ratification within the specified time. Lord Lansdowne's reasons for his action are based partly on grounds of policy, partly on the nature of the proposed convention in its amended form. The grounds of policy are, put shortly, that the British Government consented to open negotiations on the American Government expressing its desire to obtain such modifications of the Clayton-Bulwer treaty as would enable the United States Government to undertake itself the construction of the inter-oceanic canal by the Nicaraguan route and thus control a practical waterway between the Atlantic and the Pacific, which was of increasing importance in view of the expansion of American power in the Pacific, so far as should be consistent with the main principle of neutralisation embodied in the former treaty. On finding, however, after the treaty (which made considerable concessions to the United States) had been drafted that no progress could be made by the Joint High Commission then sitting to discuss the outstanding differences between Canada, Great Britain, and the United

States owing to the latter refusing to make any concessions, Lord Salisbury declined to proceed with the treaty and only subsequently consented to reopen negotiations on the basis of the treaty proposals already put forward.

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Lord Lansdowne's criticism of the effect of the Senate's amendments goes to three points: that the treaty in this form did not contain the existing renunciation by the parties of their freedom of action in Central America: that the concession of military control over the canal to the United States would give them undue military advantages over Great Britain; and that the omission of the provision of the Clayton Bulwer treaty that other Powers should be given notice of the treaty and be invited to adhere to it would have the effect of placing the neutrality of the canal under the guarantee of the two contracting Powers only, and of putting Great Britain at a disadvantage with other Powers who would not be bound to respect the stipulation of neutrality. Lord Lansdowne further denied that the provisions of the Convention relating to the Suez Canal, which safeguard the interests of the Egyptian Government, constituted any analogy to the proposed military control of the canal in case of necessity by the United States, which was not the territorial sovereign.

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Due allowance can be made for the considerations that the two canals do not stand on quite the same footing, the status of the respective countries not being the same, and ownership by an international company differing from that by a foreign Power, in that the latter might naturally expect to obtain some advantage in return for the expense of construction and maintenance of a work which other nations are going to use, and that such a canal would be of far greater strategical value now

to a North-American Power than it would have had in 1850. But it must be remembered that Great Britain's interests in such a canal, great as they are, might have been much greater if the Clayton-Bulwer treaty had not prevented her expansion in Central America beyond the limits of her possession of the Colony of Honduras, and the consideration for her renunciation of freedom of action in Central America was that the United States and herself should remain on a footing of equality in the Isthmus. If, as was at first expected, British capital had constructed the canal, Great Britain could have claimed no preferential rights. It is to be hoped, however, that a fresh treaty on the original lines of the Hay-Pauncefote project will be soon substituted for the Clayton-Bulwer agreement, which is admittedly now out of date.

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### South Africa.

The war in South Africa still continues; and will do so so long as the Boer operations are carried on by organised bodies of men under the orders of regular chiefs and acting according to military rules of movement. But with the definite occupation of the country, the dispersion of these hostile bodies, and the ceasing of any organised collective hostilities against the British forces, the state of war and the privileges of belligerents also may be considered as at an end. In this connection the provisions of the *Instructions for the United States armies in the field* (Lieber's Code of 1863) may be noted. Article 52 declares that no belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit, but if the people of a country or any part of it already occupied by an army rise against it they are violators of the laws of war and are not entitled to protection. By Article 81, men or squads of men who commit hostilities



whether by fighting or by inroads for destruction or plunder, or by raids of any kind without commission, without being part of the organised hostile army and without sharing continuously in the war, but who do so with intermittent returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character and appearance of soldiers are not public enemies, and therefore if captured they are not entitled to the privileges of prisoners of war. Article 84 applies the same rule to armed prowlers or persons of the enemy's territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail or cutting the telegraph wires, as also to war rebels or persons within an occupied territory who rise in arms against an occupying or conquering army, or against the authorities established by the same. It is to be hoped that the adoption of these measures will not be found necessary before peace can be established.

An interesting point is raised by the announcement that the annexation of the former Republics does not pass to the British Government the rights of the Transvaal Government to compensation from the British South Africa Company for damages done by the Jameson Raid. Phillimore (*International Law*, vol. iii., 827, 3rd Edition), in discussing the power of the conqueror over incorporeal things belonging to the conquered State, states that "when debts due to the enemy State be situate in the conqueror's own country they cannot be acquired upon the principle on which debts in the conquered country are seized, they are not a part of the *bellum occupatio*, they are not captured simultaneously with the land in which they are situate, but they are acquired on the principle that when war has broken out a

belligerent has a right to compel his own subjects to pay to their own State the debts due from them to the enemy State." In English law, however, this right of the Crown is now regarded as obsolete (*Attorney General v. Warden*, 1669, Parker 267; *Purshott v. Rogers*, 3, Bos and P. 191); and in *Wolff v. Oxholm*, the Court of King's Bench determined that the action of the Danish Government which in the war in 1807 had issued an ordinance sequestrating all debts due to English subjects from Danish subjects and ordering them to be paid into its Treasury was a violation of International Law, and consequently that it was no defence for a Danish subject who had so paid the amount of his debt owing to a Dane naturalised in England (6 M. and S. 100). Whether this is correct as a statement of International law on this point may be doubtful, for the large body of jurists hold that the right of confiscating the debts of an enemy is a corollary to the right of confiscating his property (Phillimore, iii. 145-147, 853); but the right in International law certainly seems to have fallen into disuse.

Considerable comment has been made on the reputed ill-treatment and execution by the Boer Generals of their countrymen sent as peace envoys from the British headquarters to treat for peace with the Boer forces under the protection of a flag of truce. The rule of the inviolability of persons under a flag of truce is absolute, subject to the understanding that by the rules of war a military commander may refuse to receive a flag of truce, if he does receive it he may forbid it to return, he is not obliged to cease fire or stop his operations because of its approach, and he has the right to prevent an enemy taking advantage of his mission to obtain information or to tamper with the hostile forces. In case of the envoy abusing his position he may be detained temporarily, and if he has so taken advantage or commits an act of treachery he forfeits

his inviolability. Washington thus seized persons, though protected by a flag of truce, on the ground that they were deserters and traitors, persons whom crime rendered amenable to the civil law, and Hall (*International Law* 563) expresses the opinion that deserters, whether bearing or in attendance on a flag of truce, are not protected by it, and may be seized and executed on notice being given to the enemy of the reason of their execution. The latter's authorities do not, however, bear out this wide statement: e.g., Halleck only says that deserters where found by a belligerent among his enemies have no protection by any compact of war such as truce, capitulations, cartels, etc., unless specially mentioned, or the stipulations of amnesty are wide enough to cover these (ii, 33). The general international practice to-day seems in any event to make a person covered by a flag of truce and admitted within hostile lines inviolable, unless he transgresses one of the conditions named above, whether he can be considered a deserter from his former allegiance or not.

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The reported willingness of the British Government to pay a limited amount of compensation to subjects of neutral Powers resident in the late Republics for losses suffered by them in the course of the war, is in analogy to the modern practice with regard to the *jus angarie*, by which neutral property found within the hostile territory can be used or destroyed by the belligerent on condition of his making compensation for it. But in strictness if a plea of military necessity be made out, such resident foreigners must be prepared to take the consequences of International war Hall 232).

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In view of the announcement lately made, perhaps not seriously, of the intention of the Continental sympathisers

with the Boers to raise funds to enable them to carry on hostilities, it may be remembered that according to the modern practice a belligerent cannot generally regard such action by individuals as a breach of the neutrality of the State to which they belong. This question has arisen on several occasions in England, in connection with subscriptions by individuals here in favour of a belligerent, notably in the case of Poland in 1792-3, the war of Greek independence of 1823, and the civil war in Spain in 1873; and the view of the law officers in 1823 has always been followed, viz.: that "while strictly speaking such conduct is inconsistent with neutrality and contrary to the law of nations a belligerent has no right to consider such subscriptions as constituting an act of hostility on the part of the Government although they might furnish just cause of complaint if carried to any considerable extent," and in Mr. Gladstone's words in 1873 "except under the Foreign Enlistment Act or the common law principle applicable to the duty of an English subject which requires him to respect the peace of the dominions of a foreign Power with which his Sovereign is at amity," this is not an offence by English law. Mr. Webster in 1842 on complaint by the Mexican Government of advances made by the American citizens to the Government of Texas with which it was at war, answered that there was nothing unlawful in this and that these were things which no Government undertakes to restrain (Hall 620).

### Recent Cases.

In *Bailet v. Bailet* the Divorce Court has recently held that a marriage made between domiciled French subjects at the French Consulate in London according to the forms required by French law is valid. This is based on the principle of the extritoriality of the embassy or consulate recognised by Lord Stowell in England in *Pertreis v.*

*Toudear* (1 Hagg. Cons. 136), but it is a necessary condition that one of the parties must be domiciled in the country represented by the embassy or consulate and that the forms required by the law of that country are followed. Under our Foreign Marriage Act, 1892, marriages celebrated abroad before competent marriage officers (which include British diplomatic representatives) are valid although only one party is a British subject, though they may not be valid in that country; but a marriage officer may refuse to solemnize a marriage in his opinion inconsistent with International law. The safer rule would be that both parties must be subjects; and in this sense at the Conferences on private International law held at the Hague in 1893 and 1894 (to which our Government was not a party) one of the resolutions on the essentials of a valid marriage provided that "as regards form, a marriage celebrated before a diplomatic or consular representative according to the law of the parties' country shall everywhere be recognised as valid, if both parties belong to the State which is represented by the legation or the consulate respectively and if the law of the country where the marriage has been celebrated does not forbid it, *e.g.*, as in Germany, except for persons belonging to the ambassadorial suite.

In *Dulancy v. Merry* it has been held, on the principle that a transfer of moveable property good by the law of the country where it is made is valid although it is not good according to the law of the transferor's domicile, that a foreign deed of arrangement for the benefit of creditors made by a foreigner domiciled abroad need not fulfil the formalities required by such a deed if made in England, *e.g.*, registration, in order to enable the trustee under the deed to have a good title to property of that foreign debtor in England.

G. G. PHILLIMORE.

*In re Martin* [1900] P. 211.<sup>1</sup>

For the purpose of this note the case may, according to the judgment of the Court of Appeal (Lindley, M. R., dissenting), be summarised thus : A Frenchwoman, having made her will, marries a Frenchman domiciled, at the time of marriage, in England, and dies domiciled in France. It was held that her will was null and void according to English law.

The judgment suggests the following observations :—

(1) The wife's antenuptial domicile is immaterial. Jeune, P., and Rigby, L.J., did not advert to it at all. Vaughan Williams, L.J., incidentally remarked that she had an English domicile (the two latter judges constituting the majority in the Court of Appeal). Lindley, M. R., held that her domicile was French. All the judges, on the other hand, agreed that the decision must turn on the question of the husband's domicile at the time of marriage. This is a striking and perhaps extreme instance of the paramountcy of the law of the matrimonial domicile. Let us use another illustration : A German widow, having made her will in favour of her first child by her first husband, marries in Germany a German who at the time has his business and lives in England. The will is deposited with the German Court in legal form. The spouses not long after resume their domicile of origin. On her death the English Courts, finding that the first matrimonial domicile was English, would hold that the will was revoked on the presumption that she must have known this peculiar provision of the Wills Act, notwithstanding her domicile was German at the time when she made it, and German when it was to come into force.

(2) Closely connected with the above point is the question, appearing in two of the judgments, viz., whether

<sup>1</sup> This case (*Loustalan v. Loustalan*) was briefly referred to in No. 315 of this Magazine, at p. 237.

section 18 of the Wills Act is part of the testamentary or part of the matrimonial law. The president was of opinion that it was part of the testamentary law—Vaughan Williams, L. J., that it was part of the matrimonial law. The other judges did not discuss it. The point is thus not directly settled. But I think we may from the determination of the whole case, by way of an indirect process, get an answer. It was agreed on all hands that the last matrimonial domicile at the time of the wife's death was French. Starting from this fact, it appears to me that the only possible conclusion is that the said provision belongs to the matrimonial law—in other words, that it raises a *presumptio juris et de jure* to the effect that husband and wife on entering matrimony intend to place their dispositions *mortis causa* on an entirely new basis. Whilst, if it were part of the testamentary law, the domicile at the time of death, according to general principles of English law, would have governed.

(3) A third question, of wider interest and forming the basis of the present decision related to the criteria of a change of domicile. Jeune, P., came to the conclusion that the husband's domicile, at the time of marriage, was French; Lindley, M. R., was of the same opinion; but the two other members of the Court of Appeal held that his domicile was English; and this latter must be taken as the prevailing opinion on the crucial point of the case.

I may in the first place observe that the exacting doctrine of *Moorhouse v. Lord*, even in its attenuated interpretation, as read by Mr. Westlake, is apparently quite dead. That case is not so much as mentioned in any of the judgments. The view that a man, in order to establish a domicile of choice, must intend *quatenus in illo exuere patriam* is hereby unmistakably repudiated.

Which then were the criteria guiding the two learned Lord Justices? Rigby, L. J., says: "I take it that the

proper conclusion is not that he had the intention of returning to France at the end of an interval however long, but that he had no intention of returning at all." Vaughan Williams, L.J., on the other hand, says: "He may have contemplated the possibility of returning to France; but this does not prevent his permanent residence in England being cogent evidence of an intention to acquire a new domicile. I suppose the possibility of returning to one's domicile of origin, if circumstances should change, is never excluded from a man's mind, however much he may choose a country other than that of his domicile of origin as his permanent residence." With the greatest respect to the other learned judges, I venture to think that Vaughan Williams, L.J., has in this passage struck the right psychological note of the question, and in this, I find, he has been foreshadowed by Bramwell, B. (*Attorney-General v. Pullinger* [1861] 30 L.J. 115), who observes: "There is not a man who has not contingent intentions to do something that would be very much to his benefit, if the occasion arises. But if every such intention or expression of intention prevented a man having a fixed domicile, no man would ever have a domicile at all, except his domicile of origin." From these authorities it might be deduced that the true criteria of a change of domicile are: abandonment of the domicile of origin and actual residence in a country of choice, combined with the *animus manendi* (not necessarily *animus non revertendi*).

(4) Lindley, M. R., critically analyses the way in which the evidence of French lawyers was taken before the President. He says: "They based their opinion on their view that at the time of the marriage the parties were domiciled in England, and they applied the English law of marriage to that state of things." Now, as I have mentioned before, the President's view was that the first matrimonial domicile was French; and the unavoidable



result, therefore, was that the argument of the French experts and the reasoning of the Judge respectively were at cross-purposes. There can be no doubt that it was a mistake to allow foreign lawyers to apply English law, which even a Foreign Court would consider to be pre-eminently within the province of English lawyers. But I submit that a suggestion of even wider-bearing might be made, viz., that, where owing to a conflict of laws, for the determination of a case, several interdependent legal points are to be considered, the Judge of first instance should not content himself with having the experts examined from one single point of view only, but should take care that, for the purpose of appeal, the various combinations and contingencies be discussed by them.

(5) Lastly, I beg to draw attention to a passage in the judgment of Lindley, M.R., where he is reported to have said: "Section 18 of the Wills Act does not apply to the wills of foreigners who die domiciled abroad (Deane's *Wills Act*, note to s. 18, cites an authority for this.)" I have referred to Deane's *Wills Act*, but am unable to find that proposition. I beg to submit that an error must have crept into this judgment as reported. For this reason: If the above proposition had been adopted as settled law by Lindley, M.R., his judgment would simply resolve itself into this syllogism: Madame Loustalan was a foreigner, and died domiciled abroad; Section 18 of the Wills Act does not apply to foreigners dying domiciled abroad: Ergo, s. 18 does not apply to the present case. The whole of the judgment of the then Master of the Rolls shows, however, that such was not the essence of his reasoning. I may observe that the head-note of the Law Reports alters this proposition by stating: "Per Lindley M.R., s. 18 of the Wills Act, 1837, does not apply to the wills of foreigners domiciled abroad." The omission of the words "who die" clearly makes all the difference.

**JULIUS HIRSCHFELD.**

## IX.—NOTES ON RECENT CASES (ENGLISH).

In *Phillips and others v. Alhambra Palace Company* (45 S.J. 81) the plaintiffs had entered into a contract with the Company to perform at their Music Hall for a fortnight, commencing the 23rd October, 1899. In the previous month of July, the hall in which the performance was carried on, was sold by the mortgagees under their power of sale, and the business was wound up. The contract was signed on behalf of the plaintiffs by one F.L., and on behalf of the Company by one T.H.G. There was no evidence that the plaintiffs had any knowledge of the composition or nature of the Company with which they were contracting. The contract said "no play, no pay," and that "in the event of any unforeseen calamity by which the business may be suspended or stopped, all engagements will terminate immediately." Moreover, since the signing of the contract, one of the members of the Company, which consisted of three persons, had died. It was contended, on behalf of the Company, that the contract, being one for personal service, was *ipso facto* cancelled by the death of one partner in the firm; also, that the contract was cancelled by an unforeseen calamity, viz., the sale of the hall; and lastly that the terms were "no play, no pay." But the Divisional Court on appeal (Lord Alverstone, L.C.J. and Kennedy, J.) held that the death of one of the partners was not an "unforeseen calamity," nor the sale of the hall, either. Nor was it a contract in which the personality of the deceased was relied on. Therefore it could be enforced by the plaintiffs, notwithstanding the death. Moreover, it had no relation to the action of the dead partner. It was altogether different from the class of contracts which depend upon the personal services or skill of the deceased, and performance of which cannot, of course

be demanded of the representatives of the deceased. Thus an apprenticeship contract is terminated by the death of the master, and no claim to the services of the apprentice survives to the executor. The law on this subject is well laid down in *Baxter v. Burfield* (2. Str. 1266) and in *Finlay v. Chirney* (20 Q.B.D. 491) where the Court held that no action would lie against the executors of a man who, in his lifetime, had broken a promise to marry. The Court would not say that an action might not lie if special damage was proved, but the contract to marry was personal and did not survive to the representatives.

The Larceny Act, 1861 (24 & 25 Vict. c. 96), provides against frauds by agents, bankers, or factors in its seventy-fifth section, and enacts (*inter alia*, that whosoever having been entrusted either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security for any purpose, shall in violation of good faith and contrary to the terms of such direction, in anywise convert to his own use or benefit such money or security, shall be guilty of misdemeanour. The section then makes certain exceptions in favour of trustees, mortgagees, and persons disposing of securities on which they have a lien. But from the decision of the Court for Crown Cases Reserved in *Reg. v. Kane* (110 L.T.J. 204),<sup>1</sup> following *Reg. v. Portugal* (16 Q.B.D. 487) it appears that the other agent must be a person whose occupation is similar to those enumerated in the words preceding, and he is not a person who may from time to time be entrusted with valuable securities. In *Reg. v. Kane*, the accused was a conjuror and thought reader who had been entrusted by the prosecutrix with a cheque for £60 to be invested for her in the shares of a particular Railway Company. He mis-

<sup>1</sup>[1901] L.R. 1 Q.B. 472).

appropriated the amount, and this was the subject of the indictment. In *Reg. v. Portugal*, the accused, who was neither banker, merchant, broker nor attorney, but was employed by the prosecutors, who were railway contractors, to procure for them a contract for the construction of a foreign railway, had misappropriated valuable securities with which the prosecutors had intrusted him in the course of his employment. In both these cases the accused escaped from the claws of justice. The Lord Chief Justice (Lord Alverstone) although there was in *Reg. v. Kane* a substantial point to be argued on the question of a direction in writing, felt bound to follow *Reg. v. Portugal*. We cannot but agree with his decision. An agent for the purposes of the section must mean a person who carries on the business and occupation of an agent, who being intrusted with money or securities, in that capacity, without authority sells, pledges or negotiates them. It cannot mean one who upon a solitary occasion acts in a fiduciary character. This is exemplified by the decisions of similar cases *Rei. v. Prince* (Moo. and M. 21), *Reg. v. Cooper* L. R. 2 C. C. 123, and *Reg. v. Tallock* (2 Q. B. D. 157).

Some pretty questions on the Merchandise Marks Act 1887 (50 & 51 Vict., c. 28) were raised in *Williamson v. Ticerney* (110 L.T.J. 203) the case being an information preferred by the respondents against the appellants, charging them with unlawfully and with intent to defraud applying or causing to be applied to a certain watch a false trade description, viz., "English lever." The facts are very numerous and intricate, but from the decision of the Divisional Court the following points are to be evolved, viz.: If the component parts of a watch are made abroad and brought to England ready to be put together, and are put together in England, and then sold as an "English lever," the trade description is false; but if certain parts

of a watch were, in part, made abroad, it does not necessarily follow that the watch may not be legally called an "English lever."

*The Pharmaceutical Society v. White* (110 L.T.J. 378)<sup>1</sup> is a decision of the Court of Appeal on section 15 of the Pharmacy Act, 1868 (31 & 32 Vict., c. 121). This section imposes a penalty upon "any person who shall sell or keep an open shop for retailing" poisons without being duly qualified. The penalty is recoverable by action. The defendant carried on a business as florist, and without being a "qualified person," sold a dram of weed-killer, which contained a preparation of arsenic; arsenic being a poison within Schedule 1 of the Pharmacy Act, 1868. The defendant on being asked for the weed-killer said that he did not keep it in stock, but that he would take an order for some and write to the Company at Liverpool for whom he acted as agent, or if preferred the purchaser could send the order himself. The purchaser, however, asked the defendant to get it for him, and paid him. The Company sent the weed-killer direct to the purchaser. The County Court Judge held that the defendant was merely an agent for the Company, and was in the position of a canvasser for orders with authority to receive money on account of the Company. The plaintiffs appealed to the Queen's Bench Division, which affirmed the decision of the County Court Judge. The plaintiffs appealed further, but the Court of Appeal (Smith, M.R., Collins and Romer, L.JJ.) confirmed the Courts below and dismissed the appeal.

A very important case on fixtures was decided in *In re De Falbe, Ward v Taylor* ([1901] 1 Ch. 523) on appeal from Byrne, J. The question was whether some pieces of tapestry, of large value, which had been purchased by

<sup>1</sup> (1901) L.R. 1 O.B. 601

Madame de Falbe, deceased, who was tenant for life of the Luton Hoo estates in Hertfordshire and Bedfordshire, and had been affixed by her during her lifetime to the walls of the drawing-room of the mansion house, formed part of her personal estate, or whether they had become attached to the freehold and had passed with it to the remainderman. Byrne, J., had held on the authority of *D'Eyncourt v. Gregory* (L.R. 3 Eq. 382) and of *Norton v. Daskwood* ([1896] 2 Ch. 497) that the tapestries had become attached to the freehold, and passed with it. The manner in which the tapestries were attached is not without much importance. The whole of the room on the west side and on the north side in that part of it where the most important piece of tapestry was fixed, was prior to the tapestries being put up, faced over the brick and plaster with wood permanently fixed by means of screws or nails, and this wood casing appeared to be part of the permanent structure of the walls. The tapestries were fixed as follows:—Small slips of wood were nailed and screwed to the wooden casing, or to the walls in some cases, and over these wooden slips canvas were stretched and nailed, and the tapestries were fastened to these wooden slips and over the canvas, and were tacked on to the framework. Mouldings were fixed round all the tapestries, except one, and as regards the small one there were mouldings made to accord with the rest of the decorations of the room. Some of these were nailed with long nails to, and, in some cases, through the wooden casing, and these nails even in some cases penetrated the plaster. The Court of Appeal (Rigby, Vaughan Williams and Stirling, L.JJ.) held the tapestries had been thus affixed for the purpose of ornamentation, and the better enjoyment of them as chattels, and that on the death of the tenant for life they did not pass with the freehold to the remainderman, but formed part of the personal estate of

the tenant for life and could be removed by her executor. It will thus be seen that chattels affixed by a tenant for life to the walls of a house for ornament and better enjoyment as chattels are removable by the tenant for life or by his executor after his death, even though they have been fixed as firmly as they would have been if it had been intended to annex them permanently to the freehold. But the purpose of the annexation must be inferred from the circumstances of each case. The Court further held that the executor ought to pay the expense of making good the damage done in removing the tapestries, although he need not redecorate the room, an axiom which appeals not only to equity but to common sense. Rigby, L.J., further spoke of the very inconclusive reasoning of Lord Romilly, M.R., in support of his decision in *D'Eyncourt v. Gregory*.

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*In re White, White v. Edmond* (110 L.T.J. 357) is interesting with regard to the curious question of a woman's age. Courts of Equity will under certain circumstances draw a presumption as to whether a woman be of an age past child-bearing or not. Here a testator had bequeathed certain leaseholds to trustees upon trust to permit his daughter A. to receive the rents thereof for life, and upon her death to stand possessed of the leaseholds in trust for all the children of A. who should live to attain the age of 21 years, and if more than one in equal shares as tenants in common absolutely. A., who was born in 1844 and was married in 1866, had one son only. Her husband had died in 1890, and she had not been remarried. She and her son applied by originating summons for a declaration that they were between them absolutely entitled to the leaseholds, and that the trustee of the will might be ordered to assign the same to them. The Court (Buckley, J.) made the order asked for, presuming that A. was past child-bearing, she being more than 56 years of age.

In *In re Widows' Trusts* (L. R. 11 Eq. 408) a spinster of 53 years and nine months, who was entitled under her father's will to share in his residuary estate absolutely if she had no children, but in case of having a child or children for her life only with power of appointment, was ordered to be paid her share; and her sister, a widow of 55 years and four months, similarly entitled, was given a like order. Again in *Haynes v. Haynes* (35 L.J., Ch. 303) the Court drew a like presumption in the case of a spinster of 53 years and two months, while *In re Millner* (L.R. 19, Eq. 245) is an authority for the same presumption concerning a wife of 49 years and nine months who had lived with her husband for 26 years without issue. *Davidson v. Kilmington* (L.R. 18, Ch. D. 213) and *Lyddon v. Ellison* (19 Beav. 565) refer to the same orders in the cases of spinsters of 54 and 56 years respectively. On the other hand the Court refused to treat as past child-bearing a woman aged 54 years and six months who had never had any children but had only been married for three years (*Croxton v. May*, L.R. 9, Ch. Div. 388); while in *In re Warren's Settlement* (52 L.J., Ch. 928) the Court of Appeal refused an application where the husband was 53 and had been married 28 years to the wife who was 50 without having children, and there was medical evidence that it was almost impossible she should have children. But there are obvious reasons why the Court should not extend similar presumptions in the case of males, for in the *Banbury Peccage Case* (1813) several instances were cited of men above 80 years of age being known to have had children.

In *Chambers v. Goldthrope* (110 L.T.J. 425)<sup>1</sup> two actions were brought by an architect against a building owner to recover his fees. The defendant counter-claimed for negligence. The contract made between the defendant and the building contractor was in a form issued by the National Asso-

<sup>1</sup> [1901] L.Q.B. 624.



ciation of Master Builders of Great Britain, and provided for the payment of the contractor on interim certificates, as the work progressed, and also on a final certificate, all to be given by the architect. The defendant obtained judgment on the counter-claim in the County Court. On Appeal to the Divisional Court, the Judges (Channell and Bucknill, JJ.) held that acting under the particular words of the contract the architect held a judicial position between the building owner and the contractor and was not liable for negligence. The defendant appealed to the Court of Appeal. In the second action, the contract was not identical, but the point of law was the same, and Mathew, J. held that the architect was in the position of an arbitrator, and that no action for negligence would lie against him. The Court of Appeal (Smith, M.R., Collins, and Romer, L.JJ.) affirmed the decisions of the Divisional Court, and of Mathew, J., holding that the architect in giving his certificate was in a position of an arbitrator, and not liable for negligence; Romer, L.J. dissenting, and holding that the architect was merely acting on behalf of the building owner and was therefore liable for negligence in performing his work. This is an important decision, the cases on the subject being very few and meagre. They are *Wadsworth v. Smith* (L.R. 6 Q.B. 332); *Pappa v. Rose* (27, L.T.R. 348); *Tharsis Sulphur Co. v. Loftus* (27 L.T.R. 549); and *Stevenson v. Watson* (40 L.T.R. 485).

Section 148 of the Bankruptcy Act, 1883 provides that for all or any of the purposes of that Act a Corporation may act by any of its officers authorised in that behalf under the seal of the Corporation, and a firm may act by any of its members. On a petition in bankruptcy being presented by a limited company against the debtors, the petition was signed for the Company by a clerk in its employ, who did the secretarial work, but who by a resolu-

tion of the directors was authorised under the seal of the Company to take all necessary steps in Bankruptcy against debtors of the Company, on behalf of the Company. On the hearing of the petition an objection was taken that under section 148, a Company ought to act by one of its "officers," authorised under seal, and that the clerk was not such an officer, and the Registrar allowed the objection. On appeal to the Court of Appeal, the Court (Rigby, Vaughan Williams, and Stirling, L.JJ. allowed the same. They held that any person chosen *bona-fide* by a company to be their agent for the presentation of a petition in bankruptcy became thereby an officer of the company for that purpose, and although the clerk was not, before his appointment under seal, in any ordinary sense an officer of the company, he became by his appointment sufficiently an officer for the purpose of the Act to present the petition. (*In re Tomkins and Co.* 36 L.J.N. 42)<sup>1</sup> His judgment should be read with the Rules 246, 258-270 of 1886, and 1890.

In *Knight v. Williams* (15 S.J. 164)<sup>2</sup> the question as to who has the right to the old lease when a new one has been granted, which overlaps the old one, was again agitated. The plaintiff was in March, 1900, the reversioner of some house property of which the defendant held a lease expiring at March, 1901. In March, 1901, the plaintiff agreed to accept the surrender of the defendant's lease, and to grant him a new lease for a term which would expire in 1920. The new lease and counterpart were duly executed, but on completion the landlord refused to hand over the new lease, unless the tenant would hand over his old lease. On the refusal of the tenant to do so, an action was commenced. Cozens-Hardy, J. held that the acceptance of a new lease operates as an implied surrender, by operation of law, of the old lease within section 3 of the Statute of Frauds but such surrender is not absolute, and is subject to the implied

<sup>1</sup>(70 L.J.Q.B. 223).

<sup>2</sup>[1901] 1 Ch. 236).

condition that the new lease is good, and if it be not good the old lease remains in force. When a lease is determined by re-ëntry or has expired by lapse of time, the lessor is not entitled to recover the lease (*Hall v. Ball* 3 M. & G. 242; and *Edworthy v. Sandford* 3 H. & C. 330). A further point was decided by the same learned Judge in *In re Gray* (110 L.T.J. 184) where a lessee of mines having obtained the usual third party order to tax the lessor's bill of costs, the taxing master allowed certain items for negotiations and fees to a mining engineer before the granting of the lease. On appeal, the learned Judge held that the lessor could not recover for negotiations or fees paid to the mining engineer previous to the lease; further, that the third party order did not make the lessee liable to pay these costs.

The case of *Eaden v. Jeffcock* (L.R. 7 Ex. 379), referred to at page 102 in the case of *New Sharlston Collieries Co. v. Earl of Westmoreland* appears to have been overruled, and the distinction between grantees and lessees no longer exists, for the purpose of that argument as suggested. See *Davis v. Ticharm* 6 App. Cas. 460).

SHERSTON BAKER.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Beverley Town Documents. Selden Society Publication, Vol. XIV.*

EDITED BY ARTHUR F. LEACH. London: Bernard Quaritch. 1900.

The volume published by the Selden Society for the year 1900 is not the least interesting and valuable of this series. It illustrates, from a remarkable collection of records, the position of a mediæval town under the lordship of a great ecclesiastical potentate, in this case the Archbishop of York, and shows the growth of its municipal constitution, and the struggle between democratic and autocratic influences. There is also information as to the management of the town's agricultural property, its relation to the trade guilds, its sanitary regulations, and regulations for the management of trade. The rules and orders of the guilds are also full of interest, and it is instructive to observe how closely considerations for the protection of the public are mixed with efforts for the protection of the interests of the particular trade against competition. Many curious points may be noted in the orders, such as that butchers are only allowed to kill bulls that have been baited, the regulation of the hours of work in the building trade, hours that would not be viewed with satisfaction by any trades union in the present day, and the prohibition of carts shod with iron from entering the town. Of special interest to lawyers will be the efforts of both corporation and guild to substitute arbitration for litigation, and the order against a promoter of litigation as long ago as 1429, who was not only "a source of dissension and discord and a promoter of unrighteous law suits, but also wholly ignorant of law." A very noteworthy point is the position of the important trade of weavers, who, among other restrictions, were disqualified from attainting any freeman, or bearing witness. No explanation of this extraordinary provision is given, and even Mr. Leach in his learned and exhaustive introduction fails to account for it.

*The Law relating to General and Particular Average for the use of Underwriters and other persons.* By LAURENCE DUCKWORTH. London: Effingham Wilson, 1900. This little book is intended for the use of "Underwriters and other persons," which phrase, we presume, is intended to imply that it is not in the main a book for lawyers. It would seem properly to fulfil all the promise that it makes; but of course the "Underwriters and other persons" will do well to remember that "a little knowledge is a dangerous thing," and in case of any serious question arising, will find it cheaper in the long run to consult a trustworthy solicitor. Nevertheless it is well that business men should understand something of the general principles of the law most affecting their particular business, and if regarded in this light, the manual before us may safely be recommended to their consideration. It should perhaps be noted that since the date of Mr. Duckworth's book the important case of *Milburn and Co. v. The Jamaica Fruit Importing and Trading Co. of London* [1900], 2 Q.B., 540, has been before the Court of Appeal, in which the whole history of the Law of Average, from the Rhodian law down to the present date, was reviewed.

*Charter-Parties and Bills of Lading.* By LAURENCE DUCKWORTH. London: Effingham Wilson, 1900. Although this manual—which is by the same author as that which we have just noticed, and has similar characteristics—claims to be an epitome only of the law relating to the subjects with which it deals, it is a very comprehensive epitome, nevertheless. From the first page to the last Mr. Duckworth's book is full of condensed information. Part I. deals with the law relating to Charter-parties; Part II. with that relating to Bills of Lading. There are about thirty principal cases with the rules which they establish, set forth more or less fully, while short notes and references are made to many others. And quotations are given from the more important judgments, such, for instance, as those of Lord Justice Bowen and Lord Justice Fry (as they then were) on the word "Demurrage," in *Clink v. Radford and Co.* ([1891], 1 Q. B., 631). The one drawback to what otherwise cannot fail to prove a most useful book is that the mass of information contained in it is insufficiently indexed—a circumstance which may render the use of the book as a means of ready reference a matter of some difficulty.

*Capital and Income.* By WILLIAM HENRY GOVER, LL.D.  
London: Sweet and Maxwell. 1901.

This is a well-conceived and arranged little work. Its object, as laid down in the Preface, is to present "in a concise form, the rights of life tenant and remainderman in respect of profits and proceeds of settled property, and their liabilities in respect of outgoings, outlay, and losses." The statements of the law are clear and concise, and ample authority is given for each proposition. Besides its value to practising lawyers, this book should be of the greatest use to owners of, and all interested in the management of, landed property, and we especially call their attention to the Chapters on "Timber and Minerals" and "Improvements," where they will find much to interest and some things to surprise them.

*An Epitome of Personal Property Law.* By W. H. HASTINGS KELKE, M.A. London: Sweet and Maxwell. 1901.

It is no easy thing to epitomize the law of personal property in a small book of something under 150 pages, and that Mr. Kelke has met with considerable success in this attempt reflects great credit on him. We think perhaps it would have been rather more useful for students, for whose use we presume it is written, if it had been rather fuller and necessarily therefore longer. It is very hard to say how much of the law of contract should be given in treating of rights the creation of contract, and the selection of cases has to be very judicious. This book is on the whole well adapted for the special purpose for which it is written, and the specimens of documents given often make the subject clearer to the reader than much explanation.

*Trade Union Law.* By HERMAN COHEN and GEORGE HOWELL, F.S.S. London: Sweet and Maxwell. 1901.

This work comes out very opportunely at the present time. The forces of labour and capital are facing each other and conflicts seem very imminent; so that it is important to know what the law really is that governs the relations of parties during labour conflicts. The present work is based on a book originally written by Mr. Howell as long ago as 1876, which has gone through three editions but which did not aim at being a "text book for lawyers, but a guide book for workmen." The able co-operation of Mr. Cohen has rendered the present edition—if it

may be considered as a new edition of the Handybook of the Labour Laws—a law book and a very useful one. It begins with an introduction by Mr. Howell giving the history and a short summary of the Trade Union Acts. Then comes the text of the various Acts with full notes and comments on each section. The Appendices A, B and C respectively contain the rules under the Employer and Workmen's Act, 1875, Regulations under the Trade Union Acts, 1871, and 1876, and Forms under the last two Acts. The cases are very well treated, and even *Lincher v. Pilcher and others*, is inserted on an extra sheet. Let us hope, in the words of Mr. Howell, that "a rightful understanding of legal obligations will help to secure industrial peace."

*The English Reports.* VOL. I. *House of Lords.* Edinburgh: William Green and Sons. 1900.

This is the first volume of Messrs. Green's stupendous undertaking, namely, the issue of all the Decisions of all the English Courts from 1300 to 1865, when the Law Reports begin. The advantage to a practitioner to have all the reports in his chambers is obvious, but it has hitherto been rendered almost impossible by many good reasons, of which the cost, the amount of space required, and the rarity of some of the reports are the principal. By the enterprise of Messrs. Green it now is in the power of anyone who has 150 guineas to spare—and we hope there will be many of them—to get the present contents of over 1,000 volumes into 150 taking up about the same space occupied by the Law Reports. The volumes are larger than the ordinary reports but not unwieldy, and the paper and type are quite satisfactory. The cases are all noted with references to Mews' Digest and the later decisions. A commencement has been made with the House of Lords reports and the present volume contains Shower, Colles, and Brown Vols. I.—III., thus covering the space from 1694 to 1783. We do not know that there are many very important cases from a legal point of view in the series. The best known is probably *Ashby v. White*. But many of the cases including *Selwin v. Brown*, *Chesham v. Nainby*, *Whaley v. Baynal*, *Cheslyn v. Creswell*, and *Buckingham v. Drury*, have been cited and commented on in recent times. There are also many cases interesting to the historian. For instance, there is an interesting dispute as to the liability of part of the cost of building Blenheim, which the great Duke of Marlborough tried, unsuccessfully to escape.

There is an interesting case of copyright connected with the poet Thompson's works reported in *Donaldson v. Beckett*, and the question of the claim to the high office of Lord Great Chamberlain of England is fully discussed and decided in *ex parte Burrell*. Perhaps the cases which strike us as most curious, are those of *Queensbury (Duke of) v. Cullen* and *Parke v. Burroughs*. The first deals with the liability incurred in removing the "Ladies' Club" from Albemarle Street and establishing it in Arlington Street at, we believe, what is now the Marquis of Salisbury's house. We were not aware that Ladies' Clubs flourished—not that this particular one did flourish—as early as 1775. In the second case the parties to a dispute about the validity of a will were benighted enough to refer it to the arbitration of the notorious Dr. Titus Oates. It will not, perhaps, surprise anyone, who remembers that gentleman's career, to hear that his award was set aside, Oates being alleged to be actuated by spite against the respondents, because they had been instrumental in his being turned out from being a preacher in the congregation of Anabaptists. A somewhat remarkable feature of these reports is the large proportion of appeals from Ireland, some of which describe many curious questions which arose under the confiscations and anti-Catholic legislation of those times.

*Ruling Cases*. Edited by R. CAMPBELL. Vol. XXII. Quia Timet Action—Release. London: Stevens and Sons. 1901.

This great undertaking is getting near its end. The most important headings in the present volume are "Railways and other Public Undertakings" and "Rating." The cases on both are well selected with excellent notes. We think those on rating particularly good, as the subject is one of great difficulty, and there are many unsettled points and contradictory decisions, all of which are dealt with, and the difficulties pointed out, if not removed. The American notes on the same subject are interesting, but on account of the different systems of taxation, are not of much assistance to English lawyers. There are also about 60 pages on the "Rectification and Cancellation of Written Instruments."

*The Law and Policy of Annexation*. By CARMAN F. RANDOLPH. London: Longmans, Green and Co. 1901.

This is a volume which deserves to be read with care by all who take an interest in the foreign policy of the United States,



In it are discussed some constitutional questions of the highest importance and on which it is evident that there are great differences of opinion in the United States. The special reference is to the Philippines, and the points discussed are practically what is the relation of the Philippines to the United States, how are they to be governed, and do they come under the rule of the Constitution? The question is probably largely a tariff one, but its importance extends beyond its present subject, as a development of what may be called the Imperial Policy of the United States is not impossible. The learned author puts forward weighty arguments to show that the Philippines have become part of the territory of the United States, and are therefore entitled to the benefit of the Constitution, and that the present administration has acted unconstitutionally, both in the way of legislating for them, and also in the tariffs it has fixed. The peculiar position of Cuba is touched on, in that it was surrendered by Spain without being taken by the United States. The whole work repays careful study, as it gives much information about the Constitution of the United States, the respective powers of President and Congress, and the probable trend of their foreign policy.

*Legislative Methods and Forms.* By SIR COURTNEY ILBERT, K.C.S.I., C.I.E. Oxford: Clarendon Press. 1901.

This book is full of interest and instruction, and is well worth perusal by members of Parliament, lawyers, and the public alike—those who have to make, those who have to study, and those who have to obey laws. It speaks with authority, as being the work of a man of great ability on a subject of which he has had thirty years experience. It begins with a short but interesting comparison between the growth and characteristics of Common law and Statute law in England, in France, and in Germany. He points out that the causes of the characteristics of English law have been "the continuity of legislation, the representative character of the legislative body, the strength of the central government." The second chapter is a description of the English Statutes, enumerating the various editions, etc. The fourth chapter is an important one, it is entitled "Stages in the Improvement of the English Statute Law," and gives an account of all the efforts that have been made to classify, codify, consolidate, index, and revise the Statutes from the time of Edward VI.

to the present day. Both the advantages and the difficulties of codifying and consolidating are fairly recognised, and the progress made so far in the improvement of the law is summed up as follows: "The work of indexing has been placed on a satisfactory footing. The work of expurgation and republication has been carried down to a recent date, and is practically complete for the present. The work of consolidation has come to a standstill." The subjects of consolidation and codification are again and more fully treated in later chapters, and we would particularly call attention to the latent difficulties in the way of consolidation, which are not, we think, apparent to one unfamiliar with parliamentary methods. The fifth chapter, dealing with the preparation of Acts, lets us a little behind the scenes, and introduces us to the labours and difficulties of the parliamentary draftsman. One thing that will strike every reader, and will provide a well-founded defence against much of the criticism to which the drafting of statutes is often subjected by judges and lawyers, is, that a draftsman cannot draft or arrange the provisions of a bill simply in the way that he thinks best, but "bills are made to pass as razors are made to sell." The causes of the defective form of Acts of Parliament cannot, we think, be more clearly put than they are in the following quotation:—

"In judging English Acts of Parliament, it must be remembered that the defects with which they are chargeable are in great measure directly due to the principles of the constitution under which they are framed. In the first place, an ordinary Act of Parliament is essentially a creature of compromise. In point of form, however, it is a compromise between the terms of art demanded by the lawyer and the popular language required by the layman. If the former finds such a term as 'land' loose and slipshod, to the latter 'hereditament' is pedantic and unintelligible. The result is that the laymen usually finds his satisfaction in the text, and the lawyer has to be consoled with a definition. In point of arrangement, an Act is a compromise between the order most convenient for debating a bill, and the order most convenient for administering an Act. In point of substance, a Bill as it enters Parliament may be, and as it emerges frequently is, a compromise between divergent views. It is the work of many minds, and the product of many hands. Now compromise and co-operation are admirable things in politics, but they do not

always tend to clearness or accuracy of style, logical arrangement or consistency, in literary composition."

We are glad to see that, in spite of his acute perception of the disadvantages of parliamentary discussion and amendments, Sir Courtney would not delegate legislation to experts as recommended by no less an authority than John Stuart Mill, but strange as it may appear, puts his faith in the House of Lords, to make "such formal amendments as are necessary to make the measure decently consistent and intelligible." There is a full account of Indian and Colonial legislation, and the last two chapters should be of the greatest value to parliamentary draftsmen, containing practical forms and notes which were originally prepared as a supplement to Lord Thring's treatise on "Practical Legislation." The want of some information of the sort has often been deplored, and we do not think that the benefit of it will be limited to parliamentary draftsmen, but most lawyers will sometimes find there what they would have a difficulty in finding elsewhere. The whole book is full of information and interest put in a remarkably clear and broadminded manner.

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*Wilson's Legal Handy Books: The Trader's Guide to the Law affecting the Sale of Goods.* By LAWRENCE DUCKWORTH.

*Railway Law for the "Man in the Train."* By GEORGE E. T. EDALJI. London: Effingham Wilson.

Both these little books are carefully written and likely to be useful, and if many railway travellers thoroughly master Mr. Edalji's lively little work, the railway companies are likely to have an unpleasant time of it. The traveller should, however, remember that a good many points of railway law are not quite clear, and that railway companies are sometimes in the habit of carrying cases up to the House of Lords, which they can better afford to do than he can, but that need not prevent him from trying to ascertain and enforce his rights.

*The Annual Digest, 1900.* By JOHN MEWS. London: Sweet and Maxwell. 1901.

*The Yearly Digest of Reported Cases, 1900.* By EDWARD BEAL. London: Butterworth. 1901.

One or other of these works is indispensable to the practising lawyer as he can see, not only a well arranged digest of the cases

reported in the year in nearly all the English Reports and selections from the Scotch and Irish cases, but also lists of cases "digested over-ruled, considered" and those "followed, distinguished, explained, commented on," etc. Both collections are good though the arrangement considerably differs, and the digests do even more. It is curious to notice what different views two able and learned men will take as to the best way to digest a case. For this reason one case will be found best digested in one book, and another in another; and though it is not likely that our readers will wish to buy both, we are unable to recommend one more than the other, as though they differ in method they seem to be equally well done on the whole.

*Responsibilities of Directors and Working of Companies under the Companies Acts 1862-1900.* By ANTHONY PULBROOK.  
London: FIFINGHAM WILSON. 1901.

This is distinctly one of the most original, practical and sound works on the subject of company law and management we have ever read. Dealing with the latest addition to the Statute-book the author remarks at the outset: "There are so many phrases of doubtful construction throughout the Act with slight variations of expression in different sections, that its interpretation will probably make a record for legal decisions, and as the author, after thirty years' experience as a solicitor, can only honestly advise that law is a luxury to be indulged in solely by fools, liquidators, rogues, and millionaires, he contents himself with pointing out where doubts and difficulties are likely to occur, so that sensible men may steer clear of getting involved in a law suit." After such a straight forward expression of opinion as this on the luxury of law one is prepared for the sound advice that follows, and here is a sample of it from the first chapter: "At present it is everybody's interest in the management of a company to hush up anything wrong, and an unpleasant director who has ordinary ideas of honesty objecting to that course is 'sat upon.' The only practical advice that can be given to a director finding himself in that dilemma is to throw all idea of duty to the shareholders to the winds and to think only of himself, by taking the first opportunity of resigning the company and getting rid of his shares at any price, writing off any loss as a bad debt. The action of the Good Samaritan is lost on shareholders: they prefer the man who passes on the other side

"of the way." Mr. Pulbrook evidently has a thorough appreciation of the genus shareholder. He has, moreover, but a poor opinion of the utility of the Act for the prevention of frauds. In the concluding chapter he says: "The true principle upon which jurisprudence should be based is to render it comparatively easy for frauds to be found out and punished." This he thinks the new Act altogether fails to do. It is framed to punish "the innocent for the guilty to the detriment of honest and well conducted undertakings, by stopping the spigot in placing irritating difficulties in the way; at the same time it leaves the bung wide open for dishonest men to carry on that method of promoting companies, which from experience of the past has always proved the most dangerous, and ruined a hundred times more families than the evil the Act is designed to prevent." But we have given extracts enough from the book to show its practical value. It has the Act of 1900 set out in full, with notes by the author; also an appendix of useful matter and a valuable chapter of suggestions for preventing frauds in companies. The book is readable from cover to cover and ought to be in the hands of every shareholder and director of a public company.

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*The Maritime Codes of Italy.* Translated and annotated by HIS HONOUR JUDGE RAIKES. London: Effingham Wilson. 1901.

This is the third volume and fifth Code for which we are indebted to the labours of Judge Raikes, the former ones, Spain and Portugal, appearing in 1896, and Holland and Belgium in 1898. As the learned Editor points out in his preface, the Maritime law of Italy, as is fitting in a State of which Rome, the mother of the law of modern Continental Europe, and, so to speak, the step-mother of English law, is the capital, is more comprehensive than that of the States before dealt with, including as it does a Code of Maritime law in time of war; and there is this difficulty to be dealt with, namely, that though the Italian Codes are identical for the whole country, each of the several States which were in existence before the Unification of Italy has still its own hierarchy. The Supreme Court is very rarely used, and therefore practically instead of there being one Final Court of Appeal or Cassation for the whole country, as in other European States, there are several, and as the interpretation put upon the law by one of these Courts does not bind the others they are sometimes to be found in actual conflict, and it is never

safe to rely on a decision except in the place where it has been given. We may, however, accept both the Maritime law and the learned author's comments on the same with perfect confidence, relying on the fact that as an ex-leading practitioner at the Admiralty Bar (which he relinquished some time ago for the less lucrative but more dignified position of a County Court Judge on a Circuit where there is full scope for his special knowledge in Admiralty work) an ardent student of International and Maritime law, and an accomplished linguist Judge Raikes has few equals. There is a melancholy interest attaching to this volume, inasmuch as it is dedicated to the memory of his only son "The spring of my every effort and the source of my every hope for the last twenty years," who was killed at Ladysmith whilst in command of a company of the King's Royal Rifles when successfully repelling the final assault of the Boers.

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#### NEW EDITIONS.

Second Edition *The Housing of the Working Classes Act, 1890*  
1900 By CHARLES E. ALIAN, M A, LL.B, AND FRANCIS  
J ALIAN, M D, D P H. London Butterworth. 1901.

The first edition of this manual was published in 1898, but the passing of the London Government Act, 1897, and the Housing of the Working Classes Act, 1900, renders a new edition necessary. The provision of houses for the working classes is a question so much discussed now, and so many schemes to effect it are being brought forward, that it is eminently desirable that there should be a book like this, setting forth the present law on the subject, and showing practical experience of the working of, and necessity for such Acts. The introduction has had to be re-written, and numerous additional references added to bring the law up to date. The Statute of 1900 is given with notes, and suggestions are made to meet any difficulties which may be anticipated in carrying out the Acts.

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Second Edition *The Case Law of the Workmen's Compensation Act,*  
1897 By R. M MINTON-SINHOUSI London Effingham  
Wilson, 1900.

This is supplemental to Part III. of the well known "Accidents to Workmen" by the same author. In a useful little preface the effect of the year's decisions is briefly summarised. There

are a good many important ones, although it is difficult to be quite satisfied with the logic of some of the judgments. Mr. Minton-Senhouse is very indignant with the Act of 1900, which he calls a legislative iniquity, because the employments specified are not limited to those carried on by way of trade or business, or even profit. Without being in favour of the Act, we cannot see that it makes very much difference to the labourer, for what purpose he is employed, and with all deference to the learned author we cannot see how in the hard case he gives, the maid servant sent out one day to water the garden could be said to be habitually employed in agriculture. The statistics of proceedings under the Workmen's Compensation Act, 1897, and the Employers' Liability Act, 1880, are interesting.

Third Edition. *The Law of Landlord and Tenant.* By EDGAR FOÀ. London: William Clowes and Son. 1901.

A new edition of this well-known work is welcome, and it has not been brought out prematurely, as the five years or so, which have elapsed since the appearance of the last edition, have given time for a considerable accumulation of both new cases and Statutes. The learned author regrets that he has been obliged to somewhat increase the bulk of his book, but this certainly seems unavoidable; and it is by no means unwieldy, and when we observe that the table of the cases cited fills over one hundred pages, it is remarkable that the subject has been capable of full treatment in something like 800 pages. Besides the enormous mass of case law it will be noticed, by anybody who glances at the table of Statutes, that hardly any, if any, session of the late Queen's reign passed without the addition of some Statute, which in some way affected the law of Landlord and Tenant. A good many revisions and additions have been made, to some of which Mr. Foà calls attention in his Preface. Among these there is an interesting discussion on the true legal position of lodgers, and the conclusion is arrived at, that in cases where "attendance is supplied and also where the landlord has the exclusive control of the outer door there is no tenancy in the proper sense of the word, and the lodger has no exclusive occupation, but only an exclusive enjoyment." Perhaps the most important addition is contained in the Chapter which treats on the "Covenant to pay Rates and Taxes," and particularly on the liability of tenants to payments

exacted in respect of permanent improvements to land. It will be observed by all tenants with regret, that the rules which were fairly settled on general principles down to 1897, have been shaken by "three decisions, all in favour of the landlord, which go to show . . . that the question of liability now depends less on general principles than on the peculiar force or 'magic' involved in the use of particular words." This seems unsatisfactory, and to be the sign of a rather retrograde tendency. Mr. Foà is not content to merely cite decisions in support of propositions, but when he thinks them wrong criticises them with much courage and ability. Notable examples of this will be found in his treatment of the cases *Fenner v. Blake*, and *Regina v. Hopkins*.

Third Edition. *Stone's Justice's Manual*. Edited by GEORGE B. KENNETT, Esquire. London: Shaw and Sons. 1901.

This Annual work is edited with the customary ability and accuracy, but we do not think there has been a necessity for so many additions as usual. The only two important Acts which required to be added are the Money-lenders Act, and the Companies Act. There have been some important cases, which all seem to have been duly noted up. We may notice that the learned Editor does not seem to share the doubt expressed by Mr. Foà in his *Landlord and Tenant*, as to whether costs cannot be awarded in proceedings to recover possession of small tenements. Nor does he seem to have considered Mr. Ryde's elaborate argument, in his recent work on Rating, on the subject of Appeals from Special Sessions, to which we think much weight should be attached; and as the subject is one of considerable practical importance, we hope the learned Editor will maturely consider it before the issue of the next edition.

Third Edition. *The Student's Guide to Constitutional Law and Legal History*. By CHARLES THWAITES. London: George Barber. 1900.

This is one of Messrs. Indermaur and Thwaites' popular guides for the Law Final. It is written specially for the use of students, and contains about 150 pages of questions and answers, besides a few pages of judicious advice as to what to read. The questions are well chosen and the answers, though very concise, refer to well known authorities where their accuracy can be tested,



and the information given expanded according to the requirements of the student. The answers seem thoroughly accurate as far as we have been able to test them. The book is likely to prove useful, not only for the class for which it is designed, but to many others who may require a handy book of reference on Constitutional History and Law.

Third Edition. *Hardcastle on Statutory Law*. By WILLIAM FIELDEN CRAIES, M.A. London: Stevens and Haynes, 1901.

It is very interesting, after reading Sir Courtney Ilbert's account of the theory and practice of a parliamentary draftsman, to turn to Mr. Craies' edition of Hardcastle's Statutory Law, and find out what is the lawyer's opinion as to the manner in which that work has been done. The result, according to Sir Courtney's own showing, is not very satisfactory. He says, speaking of the writers of books on the interpretation of Statute law, "They are concerned rather with the pathology or nosology of statutory drafting than with its laws of health. They illustrate bad drafting; they do not, except indirectly, lay down rules for good drafting." If this is so, there must have been plenty of bad drafting for it takes Mr. Craies something like 500 pages to discuss it. Of course all these mistakes are not the draftsman's, for as Mr. Craies puts it, "there are numberless mistakes in reference, and mistakes of all kinds in Acts of Parliament, due either to the draftsman or the printer, or to the conjoint or adverse efforts of the two Houses of Parliament." On this subject it is interesting to read the quotations from the opinions of some of the judges, notably in *Thomas v. Kelly*, where Lord Macnaughten is reported to have said: "To say that the Bills of Sale Act (1878), Amendment Act, 1882, is well drawn, or that its meaning is reasonably clear, would be to affirm a proposition to which I think few lawyers would subscribe." Perhaps the criticisms of Lords Herschell, Fitzgerald, and Macnaughten in *Cook v. New River Company* are even more severe; and as to the Finance Act, 1894 Lord Macnaughten has described some of the provisions as "strangely expressed and singularly ill-drawn."

The present edition has, of course, the addition of all the important decisions given on interpretation since 1892, and the very valuable Appendix of words judicially interpreted has been considerably enlarged as well as that of short titles.

Fifth Edition. *The Law of Landlord and Tenant.* By JOSEPH HAWORTH REDMAN. London: Stevens and Sons. 1901.

This is another well known work on the Law of Landlord and Tenant, and like Mr. Foà's book, has reached the time when a new edition is desirable, the last having been published in 1893. It has also of necessity increased somewhat in bulk, but there is no diminution in the care and ability which have been bestowed on it. Perhaps the most important new feature in it is the treatment of the Agricultural Holdings Acts. They are very carefully considered, and every information and suggestion that can be given, and made in the present stage of their working, have been provided, and in addition the whole of the Acts, together with all the Rules and Orders under them, are contained in the Appendix. We have particularly noticed the manner in which the difficult subject of fixtures is treated, and also the very important subject of repairs. Perhaps Mr. Redman is less critical of decisions than Mr. Foà, and pays rather more respect to Authority, but he takes great care as to what propositions he cites cases to support.

Fifth Edition. *Seaborne's Law of Vendors and Purchasers of Real Property.* By W. ARNOLD JOLLY, M.A. London: Butterworth. 1901.

In this edition Mr. Jolly has altered the arrangement of the book so as to commence with the contract of sale, which we think is on the whole the best and most logical plan. The last edition having appeared in 1897 there have been a considerable number of important cases to add, as well as the Land Transfer Act to consider. We notice that Mr. Jolly takes it for granted that the future practice of registration will be for the most part confined to cases of possessory titles only. The book well justifies its title of a concise manual.

Fifth Edition. *The Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897 and 1900.* By ALFRED HENRY RUEGG, K.C. London: Butterworth. 1900.

The stream of litigation under the Workmen's Compensation Acts still continues to flow, and is likely to be further contributed to by the recent Statute extending the protection of the Act of 1897 to agricultural labourers. The learned author has been largely engaged in these cases, and is therefore more competent than most men to treat the subject clearly and thoroughly. This

he undoubtedly does, and the new edition will merit the careful attention of all who have to consider such questions. The Employers' Liability Act, 1880, is first of all thoroughly examined, and some points considered which have not yet been decided under it, such as the question whether an infant could be made responsible as an employer. On this point Mr. Ruegg comes to the conclusion that the Employers' Liability Act does not impose any fresh responsibility on such infant employers. Then the Workmen's Compensation Act, 1897, is treated, and one of the first questions to be discussed, and discussed fully, is that of deciding what is a factory within the meaning of the Act, in which the difficulties connected with the cases of ships in Docks, and Warehouses away from Docks are examined and explained. Another question which Mr. Ruegg thinks appears to require further consideration is as to "what is an accident." Many other difficulties which have arisen, or may arise under these Acts, are considered, and the most reasonable answer given that the author's experience and ability can suggest, but the difficulties are not shirked.

Sixth Edition. *Digest of Civil Law for the Punjab*, chiefly based on the Customary Law. By SIR W. H. RATTIGAN, K.C., LL.D. London: Wildy and Sons. 1901.

The interesting parts of this book to an English lawyer are not the particular paragraphs in which the law of the Punjab is laid down, — we have no doubt correctly, — but in the introductions to the various Chapters, in which the learned Author gives a short treatise on the history of the subject, explained and illustrated by his great knowledge of the jurisprudence of all countries and all times. The influence of custom on, and growth of custom into law has always been a favourite subject of investigation by jurists, and there is much to suggest and interest in this work apart from merely acquiring a knowledge of the law of the Punjab.

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Eighth Edition. *Oke's Magisterial Formalist*. By CECIL GEORGE DOUGLAS. London: Butterworth and Co. 1901.

This well established work contains a large collection of forms for use by magistrates and their clerks; and it is difficult to suggest any case likely to happen in the usual run of a justice's business where he would not find the necessary form, and be able to rely on it with confidence as being correct. He would even find some forms which he is not likely ever to want, as for

instance, the remarkable form on page 485 giving the suitable statement of "Publicly exposing to Sale and selling a Wife." This is included in the part treating of Indictable Offences, but we have been unable to find any precedent for the case in Archbold, and so are glad to be able to refer anyone who may require it to the above reference. This, of course, shows the completeness of the work, as it even includes what must be a very rare offence. The forms are divided into three great divisions, namely, forms for Summary Convictions and Orders, which take up nearly half the book, forms for Indictable Offences, and forms for other Proceedings out of Sessions. Add to these 776 pages of Forms, a good Index, and you have a book the value of which to a busy Justice cannot well be over-estimated.

Thirty-eighth Edition. *Every Man's own Lawyer*. London: Crosby, Lockwood and Son. 1901.

This hardy Annual has been carefully revised and includes the most important legislation of the past year. Considering the amount of information in it, and the short space it is necessarily able to give to each subject it seems very accurate; but we notice that the statements as to the appointment of a Clerk of the Peace, and the liability of spectators at a prize fight, are still not quite right. Though the book is likely to be of considerable use to laymen in not very important matters, we should recommend them to read the introduction before trusting too implicitly to the tempting announcement on the cover "No more Lawyer's Bills."

## CONTEMPORARY FOREIGN LITERATURE.

*Revisione Critica delle più recente Teorie su le Origini del Diritto*. Pp. 188. Rome, 1901.

*Del Concetto Teorico della Società Civile*. Pp. 35. Rome, 1901.

The first of these is a thesis by a lady Doctor of Law (Dott. Teresa Labriola), which was successful in entitling her to the right of *libera docenza*. It is Hegelian in spirit, the main point being that the philosophy of law cannot be disconnected from the philosophy of history. The second is an academic address by the same lady, the point of which is the necessity of including in the study of the philosophy of law a revision of the fundamental conceptions of law, a criticism of existing law, and an anticipation of law in process of formation.

*Les Territoires Africains et les Conventions Franco-Anglaises.* By E. ROUARD DE CARD, Professeur de Droit Civil à l'Université de Toulouse. Pp. 242. Paris, 1901.

The view of a patriotic Frenchman on the position of Great Britain and France in Africa. We may or may not agree with his opinions, but there is no doubt as to the value of the maps and of the text of the various treaties and conventions contained in the book. It forms vol. xxxviii. of the *Bibliothèque Internationale et Diplomatique*, published by M. Pedone at Rue Soufflot, 17.

*La Nuova Legge Comunale e Provinciale.* By ENRICO MAZZOCCOLO (4th ed.) Pp. xi., 819. Milan, 1901.

A commentary on the law of 4 May, 1898, No. 164, interesting to those who have followed the development of local government in Italy. Compare with the English system the payment of travelling expenses in certain cases and the representative vote, where, for instance, the husband votes in respect of property owned by the wife.

*Il Codice del Teatro.* By NICOLA TABANELLI. Pp. xi., 328. Milan, 1901.

This book, like the last, is the production of the well-known house of Hoepli. It is a curious little work on certain legal questions connected with the theatre, viz., the legal relations between author and manager, the rights and duties of the audience, and the rights and duties of ticket-holders and subscribers. Some amusement may be derived from it, especially where it discusses the history and law of hissing, the illegality of contracts with the *claque*, and the pressing need of legislation on the delicate matter of ladies' theatrical head-gear.

#### PERIODICALS.

*Journal du Droit International Privé.* 1900. Nos. VII.—XII. Paris.

Professor Fiore concludes his learned paper on the international aspect of quasi-contract and quasi-delict. M. Emile Stocquart, well known for his researches in English law, contributes a terse but correct sketch of the history of the testamentary capacity of the married woman in England. Several interesting cases are reported. A court at Klagenfurt, in Austria, decided that an action for breach of promise of marriage will not lie where the plaintiff and defendant have been guilty of adultery. An Antwerp

court interprets the words, "a working day of twenty-four hours" in an English charter-party to mean any consecutive period of twenty-four hours, not necessarily a calendar day. The Court of Appeal of Brussels in a case of *Sandron v. Sandron* (26th March, 1900), decided that a will executed by a Belgian in England in the English form can be accepted as evidence of the wishes of the deceased without being admitted to probate in England, provided that it be duly executed in accordance with the Wills Act. In the Swiss decisions the reader is struck with the prominence of extradition questions. Switzerland is, no doubt, a very convenient refuge for criminals of all nations. An unusually readable number is concluded by a full and complete record of the proceedings of the International Peace Conference and of the conventions arising out of it. An article by Dr. Basdevant on the belligerent right of arrest of individuals on the high seas deals with some recent cases. Several decisions of importance are reported, and afford ground for comparison with English law. Creditors may, if their interests be concerned, apply to have a marriage declared void in France (p. 969). The validity of a gift made in England is determined by a French Court according to English law (p. 977). A Circuit Court of Appeal in the United States held that it could not in its admiralty jurisdiction entertain a claim for damages by representatives of a passenger by the ill-fated *La Bourgogne* (p. 1019). The short law of 1st December, 1900, admitting women to the French bar is set out at p. 1099. It runs thus: "From and after the promulgation of the present law, women furnished with diplomas of *licencié en droit* shall be admitted to take the oath prescribed by Act 31 of the law of the 22nd Ventose of the year XII. to those who wish to be admitted advocates, and to exercise the profession of advocate under the conditions of position, discipline, and obligations regulated by the texts in force." The usual valuable bibliography completes the volume for 1900.

*Deutsche Juristen-Zeitung.* Oct., 1900—March, 1901. Berlin.

These numbers are mainly occupied with articles on points arising out of the new Code, and with more or less academic questions, such as a proposal to constitute a *Staatsgerichtshof* for the Empire, and a discussion as to the advisability of abolishing the dramatic censorship. Among the decisions one or two may be picked out as raising questions of interest. A maid-servant who suppresses in her *Dienstabuch*, or dossier of certificates and characters enforced by the police authorities, a character un-

favourable to her, is guilty of the crime of falsification of documents. A man is under contract with a municipal authority to remove street refuse, a work of necessity allowed by the law regulating Sunday rest. One of the horses used in the work is shod by a smith on Sunday. The shoeing is incidental and accessory to the permissible work, and therefore not punishable. The Salvation Army is a religious association within the law, and therefore entitled to prosecute one who interrupts its services. The right is not diminished by the fact that the association keeps a lodging-house and lets beds for hire. An article on the Frisian "Daumenrecht" shows that local custom has not been entirely superseded by the Code. Some of the difficulties in the law of contract which may possibly arise from the use of the telephone are raised in an article on *Willenserklärungen mittels Fernsprechers*. The usual digest of leading decisions is appended to every number. A curious one is from Brunswick, viz, that an expert witness giving evidence false to his knowledge on a matter of fact cannot shelter himself from the penalties of perjury by taking advantage of the immunity given by law to expert witnesses.

*Rivista di Diritto Internazionale di Legislazione Comparata.* Sept.—Dec., 1900. Naples.

This number contains a summary of an important trade-mark case decided by the Federal Tribunal of Switzerland. By Swiss law the use of a qualificative epithet diametrically opposite to the epithet of the original trade-mark may constitute unfair competition. Hence to call goods "New England" is unfair competition with those known as "Old England." A decision is reported of the Corte di Cassazione of Turin, where it was held that a marriage between a Swiss and an Italian woman in Italy can only be dissolved by death. Nor will an Italian Court, where a divorce has been decreed by the law of another State, order the decree of divorce to be recorded in the margin of the marriage certificate.

*La Giustizia Penale.* Oct., 1900—Feb., 1901. Rome.

The decisions in these numbers are chiefly on points of practice and of little general interest. Professor Alimena Bernardino, of Modena, in his series of articles on the reform of the Code of Penal-Procedure, makes use of frequent illustrations from English

law, *e.g.*, the procedure in Habeas Corpus and under the Summary Jurisdiction Acts, and the functions of the coroner and the sheriff in preliminary inquiries. It is, perhaps, by some confusion with his Scottish namesake that the learned professor speaks of the sheriff as *presidente della corte d'assise*. It is always instructive to see how our institutions strike a foreign jurist, and with this slight exception the writer's English law seems very correct. The project of a law against usury (p. 114) should be compared with the recent English Act, which possibly may have been consulted by the Italian draftsman. It seems to be framed on very much the same lines, as far as regards the jurisdiction of the Court to abate the rate of interest. There is nothing about registration. One provision is peculiar. It is an offence punishable by fine and imprisonment to falsely denounce a person as a habitual usurer. There is a review of a work by Signor A. Cutrera on the Mafia, in which we have an attempted definition of the mysterious word. It is "the exaggeration of the sentiment of distrust of justice," and so seems connected with lynch law.

JAMES WILLIAMS.

### SOME WORKS OF REFERENCE.

*Debrett's House of Commons and Judicial Bench*, 1901. London: Dean and Sons, Ltd. (35th Year). This valuable annual forms a reliable Parliamentary guide. From the section dealing with the composition of the House of Commons, it is interesting and gratifying to note that the legal profession is, as usual, the one best represented in the House, some 142 Members being either barristers or solicitors. Full election statistics regarding the two last General Elections are given, and, to render the work complete, a condensed Peerage is added, also a full list of the Privy Council. The Judicial Bench portion of the work includes detailed biographical notices of Judges of the Superior and County Courts, Recorders, etc.

*The Newspaper Press Directory and Advertiser's Guide*, 1901. London: C Mitchell and Co. (56th Year). This is a very useful work of reference, giving as it does reliable information concerning the Press in all parts of the world. Among the special articles in this volume is one by Mr. Hugh Fraser, LL.D., entitled, "The Legal Year, in its relations to the Press," which is full of interest.

*Whitaker's Almanack*, 1901. London: Whitaker and Sons. (33rd Annual issue). *Whitaker's Almanack* is so well known that it is not necessary for us to notice it in any detail. The many changes rendered necessary by the General Election, and the alterations in the sections devoted to the Service Lists, Peerage, etc., have all been carefully and accurately made. A short history of



the 19th Century appears in the Appendix, and among other articles are short treatises on England and the Dutch Colonies, Voters' Qualifications, and many other matters.

*The Literary Year-Book and Bookman's Directory*, 1901. Edited by HERBERT MORRAH. London: George Allen. This *Year-Book*, under the editorship of Mr. Morrah, is fast becoming an indispensable work of reference to everyone who is interested in the production of literature. As it grows in popularity the Editor's trouble increases by reason of the multitude of suggestions for its improvement with which he is assailed. The volume cannot at present be indefinitely extended, but no doubt the good ideas will be carefully sifted from the bad, and gradually the value of the *Year-Book* will be enhanced. The Editor is humorous at the expense of the scribblers who write to him protesting against the exclusion of their names from the "Directory of Authors." "The suggestions that reach me under this head," writes Mr. Morrah, "are curious. Many supposed that it 'should be a great distinction to be included in this Directory, whereas, of course, 'it is no distinction at all. Were I once to select, I could not rest till I had 'reduced the Directory to twenty names, or less, and my twenty or less would be 'followed like 'Red Pottage' by an 'exceeding bitter cry.' I can only say that 'my own attempt to define an author would be 'one who has written a book. 'And some have written such little books. Some are such little authors. The 'test of membership of the Society of Authors (Incorporated) is, as far as I can 'gather, inadequate. Some of my correspondents appear to think that such 'membership is a distinction; whereas, and again of course, it is no distinction." What does the Society of Authors say to this? We think a little more care might usefully be expended in verifying names and addresses. For instance, the publishing address of this Magazine is given for a number in Fleet Street which does not now exist.

Received too late for notice in this issue:—Brooke Little's *Poor Law Statutes*; Brooke Little's *Burial Act*; Attenborough's *Leading Cases in Constitutional Law*; Emery's *Treatise on Company Law*; Fieeth's *Death Duty Acts*; Hamilton's *Manual of Company Law*; Godden and Hutton's *Companies Acts*; *The Records of the Borough of Leicester*.

Other publications received:—*The Journal of the Society of Comparative Legislation*; *The Humane Review*; *Words and Things*; Macpherson's *British Enactments in Native States* (The Superintendent of Government Printing, Calcutta); *Reports of the American Bar Association* (The Dando Printing and Publishing Co.); *The American Corporation Legal Manual* (The Corporation Legal Manual Co.).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *North American Review*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *Cape Law Journal*, *Yale Law Journal*, *New Jersey Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

No. CCCXXI.—AUGUST, 1901.

## I.—IS IT EXPEDIENT TO HAVE PAID CHAIRMEN OF QUARTER SESSIONS?

THE answer to this question depends upon two things :  
(1) Whether the present Court of Quarter Sessions performs its duties efficiently ; and (2) if not, whether, if equipped with a paid Chairman, it would perform them any better.

The first of these two questions is a somewhat delicate one to answer, and I will premise what I have to say by this : that I am speaking throughout of *lay* Chairmen of Quarter Sessions, not of those isolated cases in which it may and does happen that a practising barrister occupies the post of Chairman. When such a man is procurable without salary, there is obviously no need to provide him with one, but these are not the cases to which the question at the commencement of this article is directed.

What we have to see is, whether the ordinary Court of Quarter Sessions is or is not an efficient instrument for the performance of the duties with which it has been entrusted. The general consensus of opinion among *lay* Chairmen would appear to be that it is, and this is a perfectly natural position for them to take up. If there are any deficiencies, neither they nor their brother magistrates can very well pass judgment on them : seeing that such deficiencies, if

they exist, are due, not to the want of intelligence or business capacity of the Chairman, but solely to the fact that he has had no *legal training*.

Let us, however, be careful not to confuse the issue ; and, therefore, we should draw a sharp line of distinction between the tribunals of Petty Sessions and Quarter Sessions.

In the former, magistrates sit as a jury to decide facts as well as to mete out punishment. Probably no better or more efficient tribunal—in country districts especially—could be devised for that purpose. Position, education, local knowledge, high character, all these combine to constitute an admirable Petty Sessional Court, and one quite as well, if not better qualified to administer substantial justice in rural districts than any stipendiary, and those who criticise the apparent discrepancies between sentences passed for different classes of offences should remember that no newspaper report ever enabled, or can enable, the reader to judge of the real merits of the case or the true effect of the evidence in the same way as if he had been present at the trial : much less can anyone reading such a report be aware of the circumstances surrounding each particular case, by which the decision and the length of the sentence is modified.

This is perhaps travelling somewhat beyond the limits of the present argument, but it is well to make this point clear.

When we consider the case of Quarter Sessions, other considerations present themselves. There the magistrate is called upon to perform the functions of a judge of assize or of a borough recorder. It is not, by the way, necessarily the Chairman elected by his brother magistrates who presides. In his not infrequent absence, any other magistrate may be called upon to sit.

Let us assume, however, that the duly-elected Chairman

of Quarter Sessions presides. How far can he be expected to exercise his functions as efficiently as a judge or recorder?

Does not the question at once occur to one's mind: If it be considered necessary in boroughs that the Court of Quarter Sessions there should be presided over by a barrister of not less than five years' standing, why is it less necessary in the Courts of Quarter Sessions in the counties?

It will not be argued, I imagine, that the borough magistrates are persons of less intelligence and capacity than the county magistrates, nor, except perhaps in large towns where the work would take up too much of the time of men engaged in other employments, is it to be supposed that they would be less willing to undertake the duties of presiding over Quarter Sessions than their brethren in the counties.

To find the reasons for the existing distinction between boroughs and counties, we must look further back to the days before the passing of the County Councils Act of 1888. Up to that time the whole local government of the counties was in the hands of the magistrates in Quarter Sessions assembled; and as part of their general jurisdiction over the affairs of the county, they possessed the right of trying such prisoners as were committed for trial at the Quarter Sessions, and of hearing appeals.

The spirit of the age demanded an elected body to carry on the municipal government of the counties. The ancient jurisdiction of the Quarter Sessions was accordingly abolished, and the County Councils took their place; but whether to prove what an illogical nation we are, or for some other reason, the Legislature, while by that Act it deprived the magistrates of those powers which they were eminently fitted to exercise by virtue of their business capacity and other qualifications, at the same time left to them their legal jurisdiction at Quarter Sessions;

and it is no derogation of their general intelligence and capacity to say that technical work requires technical training, and that it cannot be expected of a man who has had no legal education, and who probably does not attend a Criminal Assize or Quarter Sessions Court on more than three or four days in the year, that he should be able to conduct this particular class of business as efficiently as a barrister who has made it the principal work of his life.

For what is it that is expected of him? First, he is expected to have at least a general knowledge of the Criminal law; as, in every case, even of the simplest nature, the law applying to it should be explained to the jury, and, besides this, points, and often intricate points of law crop up in the course of a case, and have to be decided by the Chairman, "tant bien que mal."

And how should he have this knowledge if he has never learnt it?

Secondly, he should be acquainted with the law of *Evidence*. I will appeal to the profession generally on this point, and put this question: Can a man be competent to adjudicate upon points of evidence unless he practises more or less constantly in the law courts? The points that arise are so many and various; they are so constantly brought forward in criminal cases, and no mere book-learning will give the power to decide them quickly and accurately. How, then, can it be expected that the Chairman of Quarter Sessions should do so?

The following will, to some extent, illustrate this:—

A certain Chairman at Quarter Sessions had a case tried before him in which, after the evidence for the prosecution was closed, the counsel for the defence submitted that there was no case to go to the jury. After argument on both sides, the Chairman remained smiling but silent. "Well, sir," said counsel for the defence, "is there any evidence to go to the jury?"

"I don't know that there is," replied the Chairman, *"but go on!"*

This was, no doubt, rather an extreme case of want of experience, and yet who but a professional man could appreciate the true absurdity of the answer?

But it may be said, even assuming that occasional mistakes are made on points of law and evidence, is not substantial justice done under the present system?

This question brings me to the discussion of what is by far the most difficult and responsible duty which the Chairman of Quarter Sessions has to perform, namely, to sum up cases to the jury. And this is where practice is, above all things, necessary—practice which can only be obtained by conducting cases oneself in Court, and by hearing judges sum up in the cases that come before them. In other words, to be able to sum up efficiently a man must be in practice as a barrister or as a judge. For he has, as I have remarked, to lay down the law correctly—not an easy matter by any means and for a layman very difficult—might not one say impossible?

Next, he has to marshal the facts of the case so as to present them to the jury in a concise and intelligible form; he has to sift the evidence of the witnesses, and to point out to the jury the weight to be attached to this or that piece of testimony; he has to guide their minds in the right direction, and he has to meet the arguments of the defence, especially when, as is generally the case, the defence has the last word. For, although it may be perfectly true that it is better that any number of guilty persons should escape than that one innocent person should be convicted, it is none the less true that every criminal who would be convicted if tried before a judge at Assizes deserves equally to be convicted when tried before a chairman of Quarter Sessions.

I will appeal to that part of the profession that practises

at Quarter Sessions, whether it is not in their experience that in the cases tried there, when a prisoner is defended by an able counsel, he almost invariably escapes conviction? It is no reflection upon the Chairman of the Quarter Sessions that this should be so. It is simply due to the fact that the art of summing up cases is a lesson which he has never learnt, and has never had the opportunity of learning properly; and that, therefore, his well-meant efforts to place the points of a case clearly before a jury too often have the effect of obscuring the issue.

I make these remarks with all diffidence. I know that the tribunal capable of passing a judgment on these points is a very limited one. It consists solely of those members of the Bar who have practised and are practising at Quarter Sessions in the counties; and they, of course, do not represent public opinion. Nevertheless, such is the tribunal by which public opinion, if it is wise, should be guided in this matter.

Now if our first question, whether the present Court of Quarter Sessions performs its duties efficiently, be answered in the negative, we must then pass to the second, namely, would it, if equipped with a paid chairman, perform its functions any better?

Some of the Chairmen whose opinions I have had the opportunity of studying seem to have thought it was contemplated that the present Chairmen should be paid. No one, however, would suggest that if competent Chairmen can be secured without payment, they would give any better services if paid than they do at present. The question really is whether any Court in which cases are tried by a jury should be presided over by any but a trained lawyer. At present the Court of Quarter Sessions is the only one of such courts in which laymen are allowed to preside.

Should they continue to do so? Is not the present state

of things rather the relic of a bygone age than suited to modern ideas and requirements?

My suggestion then, would be that the qualification for every Chairman of Quarter Sessions should be not less than five years' standing at the Bar, thus assimilating the practice in Counties to that in Boroughs

If, as is sometimes the case, a duly qualified person can be found to accept the post of Chairman without salary, let him be elected by all means. Otherwise let there be a paid Chairman attached to every Court of Quarter Sessions.

There is another important consideration which should not be lost sight of here. Complaints are frequently heard from time to time of the delay in the conduct of business in the Law Courts. It is a subject which has occupied the attention of law reformers during many years; and many and various have been the remedies and reforms devised and applied from time to time, and yet the complaints continue. And there can be no doubt that the absence of the Judges on circuit is one of the most fruitful causes of such delay as exists. And yet it would be very undesirable to abolish circuits altogether: the presence of a Judge in the country districts exercises a most beneficial influence; the confidence felt in his administration of justice causes his decisions to be respected in a way that would not be the case with those of lesser men; the fear of him is a potent deterrent to criminals; and his great ability makes his conduct of cases a shining example to those who practise before him, and who may in their turn be called upon to administer justice.

But, granting all this, are we not to some extent using a sledge hammer to crack a nut? There are certain cases such as murder and other of the more serious crimes which are too weighty to be entrusted to any lesser tribunal than one presided over by a Judge of the High Court. For



the trial of these, his presence is necessary. But if it were possible to extend the jurisdiction of Quarter Sessions to include all but the most serious class of cases, what an amount of judicial time might be saved, and incidentally what a great saving in expenses would result?

And why is this not done? The remedy for the waste of time is palpable. Why is it not applied? Is not this the true answer, that it would not command the confidence of the public in the administration of justice if the criminal jurisdiction of the Courts of Quarter Sessions as at present constituted, were extended any further?

And, if this is so, must not the reason be that these courts are not thoroughly efficient?

Sir H. B. Poland, K.C., whose opinion on such matters is entitled to the greatest weight, wrote a letter on this subject to the *Times* a few years ago. Recognising the necessity of relieving the Judges of some of their Assize work, and objecting, as he did, to the appointment for such purposes of Commissioners of Assize, he proposed some sort of intermediate tribunal—something between an Assize Court and a Quarter Sessions Court—to be presided over by specially appointed barristers of experience, and to sit simultaneously with the Judge at Assizes.

No doubt an excellent suggestion, but, if applied generally, rather an expensive one; for such men would require full compensation for the loss of and disturbance to their practice before they would consent to accept such an appointment.

And yet to quote the opinion of one of the existing Chairmen of Quarter Sessions on this point:—"If you give a salary to your chairman, he should be not only a barrister, but one who has had considerable practice in Sessions and Assize Courts, and you may also reasonably impose upon him further duties."

If then it be granted that it is desirable: (1) To improve

the administration of justice at Courts of Quarter Sessions ; (2) to increase their jurisdiction ; (3) consistently with economy, to appoint barristers of experience in criminal work to preside over the Quarter Sessions Courts, where shall we look for the men who will satisfy these conditions ?

Does not the answer lie simply in assigning to each Court of Quarter Sessions in the counties, whose Chairman is not a barrister of at least five years' standing, one of the Recorders of the County Boroughs to preside over it ? In the Recorders you have a body of a hundred and eleven trained men, all of whom have had considerable experience in Sessions and Assize Courts ; most of them in practice in those courts at the present time ; and if it be desirable that each court of Quarter Sessions should have a professional chairman, no easier or more economical method of providing such a chairman could well be devised. Indeed, it is so simple a means of meeting the demand, that it is somewhat remarkable that it has not been put forward more prominently ere this.

What then, would be the mode of procedure ? All that would be necessary would be to have one day, or when necessary, two or more consecutive days for the trial of Quarter Sessions cases at the court of the principal Borough or Boroughs within the county. There would come as at the Assizes at Norwich, the grand and petty juries for city and county respectively ; the court would sit on the regular Quarter Sessions days, and Bar, solicitors, witnesses, and others, would be delivered from the inconvenience caused at present by the practice of some Recorders, who fix the days for holding their courts at such times as may happen to fit in with their engagements of the moment, without reference to regular times and seasons.

What would be the cost of such a scheme as this ? The cost would be infinitesimal, and more than compensated for

by the saving of judicial time at the Assizes; for on the establishment of such a system, it would follow as a necessary corollary that the jurisdiction of Quarter Sessions in criminal matters would be largely extended.

Let us work out the expense in this way. There are in England and Wales sixty-nine courts of County Quarter Sessions. In the case of fifteen of these, the Chairmen are:—1 Law Lord; 4 County Court Judges; 2 King's Counsel (not including two of the latter rank who act as assistant chairmen in Devonshire), and 8 Barristers.

Assuming that all these fifteen qualified persons were willing to continue to act, and deal with the increased work consequent upon an extension of their jurisdiction without salary, we have then fifty-four courts to provide for. In estimating the expense, it is clear that to induce men in the position of Recorders to accept such an appointment, they should be fairly compensated for the practice they would have to give up. I am not putting the figure too low when I estimate that for fifteen guineas per diem the services of the best of these men might be secured. Take an average of one day per court per quarter. This works out at two hundred and sixteen days, which at fifteen guineas, gives a total of £3,402 to be provided.

There are in England and Wales, fifty-three counties (not including Middlesex and Surrey, whose Chairmen are salaried) so that, assuming each county to contribute an equal amount, the yearly burden upon the rates of each would be about £64, not a very alarming sum, and from the point of view of the public interest, absolutely insignificant. If the whole sixty-nine courts had to be provided for, the total amount would be a little over £4,000, and the amount to be raised by the rates in each county would average about £80 per county. I hardly think that the most nervous ratepayer would object to this on economical grounds.

It will be observed that the number of courts of Quarter Sessions to be provided with professional Chairmen is much less than the number of Recorders available. That being so, it would be possible to select the pick of the Recorders for these appointments, and they might be called "Recorders for the county" preferably to the old title of Chairmen of Quarter Sessions.

It is not unimportant to bear in mind that in assigning to each Court of Quarter Sessions a professional Chairman, the jurisdiction of the magistrates is not in any way interfered with. They remain in precisely the same position as before, only being presided over by a judge for the purpose of trying criminal cases. There would be no loss of dignity on their part, and probably such an eminently sensible body of men as our county magistrates would readily acquiesce in the change if once convinced of its desirability.

Then might the jurisdiction of Quarter Sessions be extended widely and with perfect safety ; then might there be such a saving of judicial time that the reformers of our legal system might cease for the time from reforming, and we might see in the Criminal Courts throughout the country the proceedings carried on under the superintendence of those who have given the best years of their life to learning and understanding the principles and practice of the Criminal Law.

JOHN de GREY.

## II.—LEGAL LITERATURE IN FRANCE.

WHETHER or not the numerous references to and laudatory remarks concerning M. Fustel de Coulanges, in Sir H. S. Maine's *Early Law and Custom*, justify M. Darestè's observation<sup>1</sup> that the latter had accepted all the conclusions of the former, the *Cité Antique* is one of the very few notable French contributions to the History of Law, which appear in a catalogue of modern Educational works (like Blackwells, of Oxford, for instance). Even this particular French savant is generally known to us merely as an authority on ancestor worship, his researches with reference to Benefices and early French Institutions<sup>2</sup> being to most Englishmen sealed books. It is true that his conclusions have been regarded as doubtful in his own country, at all events since the appearance in 1890 of M. Glasson's *Les Communaux et le Domaine Rural à l'Epoque Franque*, but they are nevertheless universally known on the Continent, if not accepted as always accurate. From which it would appear to be a fair inference, that, as manifold German Law Books get into English students' hands, the results of contemporary French research in the History of Law have been a good deal disregarded, or else are not surely believed among us. That this is a misfortune as regards not only the History of Law but also in the case of Roman Law as well, it is one of the objects of this paper to point out.

Without comparing in detail the curriculum, for instance, of Toulouse, the most important after Paris of French law schools, with say that of Trinity College, Dublin, or the examination for a similar grade law degree at London and Paris, either of which would be a complex task, it is easy to see what text books are in common use with us and in

<sup>1</sup> *Journal des Savants* (Jan.) 1889, p. 55.

<sup>2</sup> *Histoire des Institutions politiques de l'ancienne France; Recherches sur quelques problèmes d'histoire; Nouvelles Recherches sur quelques problèmes d'histoire; Questions Historiques.*

France, where Roman Law naturally takes a more prominent place than in Great Britain, appearing as it does under but a slight disguise in the French Civil Code.<sup>1</sup> In the five years, 1886-1890, there was an output of about 450 law books in France, of which some 25 were on Roman Law, while 18 would seem to have dealt with the History of Law alone.<sup>2</sup> During the following quinquennial period, *i.e.*, up to the end of the year 1895, fifteen hundred or so saw the light, this being the number of new legal works or new editions or translations appearing in the *Journal Général de la Librairie*. Of these 43 are on Roman Law, while the subject matter of 32 is, speaking approximately, the *Evolution Juridique* that has culminated in the *Code Napoleon*, and concerning which French genius is no longer satisfied with general explanations.<sup>3</sup> During the next four years, 1896-1899 inclusive, the most recent period respecting which full particulars are available, out of 2,120 freshly-catalogued law books, some 25 and 36 appear to be upon Roman Law and the History of Law respectively. Earlier legal text-books are not now much in fashion among French students, unless re-edited and brought up to date, nor is this class of reader wont to make use of translations of foreign works, except from German sources. About 18 text books of Roman Law, including four editions of the *Corpus Juris Civilis* figure in the *Bibliographie Générale de Droit et de Jurisprudence* for 1900, together with 19 commentaries on Roman Law generally, 41 on the Institutes and 11 on the Pandects, while there are no less than 75 on the History of Roman Law and special subjects connected with the same department of legal education. These include translations of some of the works of Von Ihering, de Keller and Savigny. Upon the History of French Law

<sup>1</sup>Maine's *Early Law and Custom*, p. 165.

<sup>2</sup>*Cat. Gen. de la Librairie Fr.* (Jordell) Tome XIII. (1895), pp. 117 *et seq.*

<sup>3</sup>*Early Law and Custom*, p. 292.

the titles of 46 works are given in the same catalogue, among which figures a translation of Maine's Ancient Law. On English Law there are 23 books, as against three on French Law in Stevens and Sons' list. Among these are a translation of a work by Mr. Dicey, and that of Mittermaier on English Criminal Procedure, as well as the great book in 6 vols. of Glasson upon the History of Law and Institutions, political, civil, and judicial, of England, the date of which is 1881-1883. The number of English Law Books in the catalogue of an ordinary bookseller at Oxford and Cambridge is about 180, all told, including those concerning Constitutional and Indian Law.

The duration of the course in Roman Law for the *Licence en droit*, which corresponds to the average law degree, is a year and a half alike at all French Universities. Being the minimum qualification of the *Magistrat* and *Avocat*, though not necessarily of the *Avoué*, it practically aims at a knowledge of the four books of Justinian's Institutes, and is preceded by some form of historical introduction.<sup>1</sup> The scope of such introduction depends upon the Professor, but always includes the history of the various Roman tribunals, and of the organization of the different public authorities in ancient Rome. The exegetic method and the explanation of the Institutes, paragraph by paragraph, is now in disfavour, and indeed has almost fallen into desuetude, constant reference to German reviews and monographs being the order of the day, and the Historical Evolution of Institutions forming the subject-matter of University lectures. The two volumes of M. Accarias, *Conseiller à la Cour de Cassation*, are still for the *Doctorat*, the text-book most in use. This

<sup>1</sup> Although for the London LL.B. Examination, the history of Roman Law to the time of Justinian is one of the subjects, Roman Law is not taken up of necessity by English Solicitors, as it is by the better class (about half in number) of French.

treatise is, notwithstanding, hardly up to date, having been published 1886-1891, inasmuch as it does not contain any reference to the latest German theories, which are to be found best set out in the manual of M. Girard, lately of Montpellier, and now a Professor of the *Faculté de Droit de Paris*. This latter is an excellent student's book that has just reached a third edition, containing conveniently arranged, as it does within its four corners, more than is required by the examiners for the ordinary Law degree. There is no German manual as complete as this, nor one which, like it, gives copious references to the latest results of scholarship in other countries, upon the subject of which, in more than 1,000 octavo pages, and at the small cost of ten shillings, it so fully treats. This excellent educational work follows the classification of Gaius and Justinian, and is divided into books dealing with (1) the History of the Kings, Republic, Empire, and Law in the West; (2) the Law of Persons; (3) that of Things; (4) *Legis Actiones*; and ending with an excellent index. It is, however, hardly sufficient for the examination for the *Doctorat*, for the first year of which there is a six months' special course of Roman Law. For this course each Professor chooses his own subject, as, to take one example, Byzantine Law. Here such a book as the *Textes de Droit Romain*, of the same writer, M. Girard, does yeoman's service. It contains fragments of the Ancient Laws, as for example *Leges Regiæ*, the twelve Tables, *Lex Julia Municipalis*, etc., the Edicts and *Senatus consulta*, the Institutes of Gaius and Justinian, the Sentences of Paul, the Rules of Ulpian, *Lex Dei*, the *Fragmenta Vaticana*, and many private acts, as *Laudatio de Turia*, *Dasumii Testamentum Fucundus*, etc. Indeed, this compendium gives most of the texts likely to be useful outside the *Corpus Juris Civilis*, and forms in itself no mean Roman Law library. The notes, if brief, are excellent, and the date of the 2nd edition as recent as 1895.



Although the *Précis de Droit Romain* of Accarias is indispensable for the *Doctorat*, other favourite manuals are the *Eléments de Droit Romain* of May, and Petit's excellent abridgment of *Accarias*.

Yet another useful book, though published ten years ago, is one by Cuq under the title of *Les Institutions Juridiques des Romains ; L'Ancien Droit*. Unfortunately only the first portion of this work has as yet appeared, a drawback that too often occurs in the case of French legal works, which have a habit of coming out in driblets or *fascicules*, to the great inconvenience of the foreign purchaser, whose *bite noire* is incompleteness. Other educational treatises on Roman Law are those of Laborde and Didier-Pailhé,<sup>1</sup> but these and many others of a like kind may be taken to be now superseded by Girard's modestly entitled *Manuel Élémentaire de Droit Romain*, a treatise that is working a veritable revolution in this branch of study, and which is much more complete and handy than Ledlie's translation of Sohm's *Institutes*, notwithstanding that Sohm has in the original already run into no less than nine editions. The latter is naturally of great interest to the student of the New German Code, to which the new edition has been brought into close relation, but for this very reason not so much so to those of other nationalities. This limitation does not, however, apply to the more historical treatise of M. Frederic Girard, the educational value of which to Roman law students of every nation it is not easy to overrate.

The present time has also been prolific of educational apparatus for elucidating the embryology of French Civil Law. M. Viollet, a member of the Institute and Law Lecturer at the *Ecole des Chartres* where Archivists are trained, has just brought out under the title of *Droit Civil Français*, a second edition of his *Précis de l'Histoire du*

<sup>1</sup>4th edition, Tartari, 1895.

*Droit Français*, bearing upon the title page the date 1903 (*sic*), in every respect complete, and furnished with a capital index. This excellent legal history obtained from the *Academy des Inscriptions et Belles-Lettres* the *Grand Prix Gobert*, which same honour M. Viollet obtained twice over for his famous work in four volumes, entitled *Les Etablissements de Saint Louis accompagnés des textes primitifs et de textes dérivés, avec une Introduction et des Notes*. The *Droit Civil*, an octavo volume of 900 pages, is divided into four books, on (1) Sources of Law—Roman, Canon, Germanic, and French; (2) Persons; (3) The Family; and (4) Property and Contracts. The part which embraces Canon law and the Bibliography completing each chapter are among its most useful features. Not only are German law books and editions of texts copiously referred to, but even brochures and magazine articles likewise. It is on a par as a medium of instruction in its own department with M. Girard's Roman law of which mention has already been made, and more complete than the manuals of either Esmein or Ginouilhac,<sup>1</sup> though inferior to the wonderful *repertoire* of M. Brissaud, *Professeur à la Faculté de droit de l'Université de Toulouse*. The full title of this latter is *Manuel d'histoire du Droit Français (Sources-Droit Public-Droit Privé) à l'usage des Etudiants en licence et en Doctorat*. The four *fascicules* of this book which have already appeared call for unstinted commendation, and the chief regret is that the whole of it could not have been given to the world at one and the same time, such publication by dribblets being a common detriment to French legal books, as, for example, in the case of M. Vidal's remarkable *Cours de Droit Criminel et de Science Pénitentiaire*, which is a much larger edition of his *Cours Élémentaire* published in 1895, the first instalment only of the former having as yet appeared.

<sup>1</sup> *Cours Élémentaire d'histoire du droit Français*, 3 Ed., 1897, and *Cours Élémentaire d'histoire générale du Droit Français public et privé*, 2 Ed., 1890.

For M. Brissaud's four *fascicules*, representing probably more than three quarters of the entire work, we have nothing but praise. Its dominant note is struck in the preface, which states that the object of the writer is that his manual shall, after having served the student in the matter of his examination, be a guide afterwards to him in original investigation into the sources of law, and to prepare him for getting to the bottom of great treatises and "*travaux approfondis*." Of these there are, of course, though mainly useful as books of reference, M. Glasson's six volumes of the History of Law, and M. F. de Coulanges' great work, besides those of Flach, Taine, Tardif, and yet older histories, but no single French or indeed German text-book seems so scholarlike or complete in itself as is the *Manuel d'Histoire* now under consideration. Beginning its first great division on the Sources of Law with Portalis' famous text, "*Les Codes des peuples se font avec le temps, à proprement parler on ne les fait pas*," the writer proceeds to declare that the revolutionary school of historians of law nowadays have to systematize and develop "by analogy to natural and physical science the ideas of Montesquieu and Savigny." After some valuable introductory remarks, Professor Brissaud deals in his first section with the Frank or Barbarian period, (481-987), in chapters treating of the personality of law, Roman law, and the *Leges Barbarorum*, with special reference to the laws of the Anglo-Saxons, and making mention in that connection of Pollock and Maitland, and Stubbs' Select Charters. With regard to the ancient law of Ireland, however, he seems to know more of D'Arbois de Jubainville than of the Irish Authorities discussed by Maine in his *Early History of Institutions*. He next tells us something of value about the *Capitularies Formulæ*, and Historians, like Gregory of Tours and Isidore of Seville. Afterwards the Sources of

Canon Law comes in for notice though not as thorough as that afforded by M. Viollet, and in this connection the story of the False Decretals is also told well if somewhat briefly. The second section comprises the Feudal period taken by M. Brissaud as lying between 987, the date of the election of Hugh Capet as King of the Franks, and the 16th century. Here we have more about Canon Law, and some valuable remarks as to its influence upon secular legislation. Then follow chapters on the Territoriality of laws inspired apparently by Sir H. S. Maine<sup>1</sup> and an excellent map illustrating the spheres of operation of Written and Customary Law. In this chapter we are told that England is the country of customs *par excellence*, while the opposition to the *Equité crébrine* of J. Favre in France is contrasted with its development across the Channel. Here Pollock's *First Book of Jurisprudence* and Arthur Duck (1653) are referred to in treating of *La Common law et l'Equity (sic) en Angleterre*. Perhaps M. Brissaud is at his best when he follows Savigny in tracing and enforcing the persistent vigour of Roman law during the Feudal period, and when he tells of the writers of Glosses and their respective productions. A more than bird's eye view of the Commentators, Precursors, Continuator, and Romanists of the 14th and 15th centuries as well as of the rise of the Universities comes next, in which passing reference is made to England, and we are here told parenthetically that education in the theory of law for both our Barristers and Solicitors still leaves much to be desired. In support of this criticism the *Revue Générale du Droit* for 1890 is quoted, and P. de Coubertin's *Les Universités Anglaises* claimed as an authority for the proposition that we have neither a school of Law nor one of Medicine. The next chapters are on general customary law, municipal charters, Books of Customs (in which refe-

<sup>1</sup> *Ancient Law*. 12th Ed. pp. 103 et seq.

rence is made to Glanville, Bracton, Britton and even Hawkins' *Pleas of the Crown*), besides monuments of Jurisprudence such as the *Olins Landgerichte Cartularies*, *Notorial Acts* and *Terriers*. These notices cover in a few pages an immense amount of ground, as yet virgin as regards text-books professing the same scope. Nevertheless, when writing about the *Fusros* of Spain, it might have been better to have made more use of the truly monumental work of Marichalar Y. Manrique in nine volumes, published by the Spanish Academy of History, or at least to have explained that therein is to be found in the middle volumes all that is as yet known upon this vast subject. Indeed, we are hardly given even the barest outline<sup>1</sup> about, for example, the remarkable Customs of Catalonia, the *Fuero Général* of Navarre, the *Forum Judicum* or the *Siete Partidas*, all of which, if mentioned at all, surely merit some careful explanation as to their methods and objects. The same section closes with observations on the rise of commercial and maritime law, on legal writers of the period, including Sir John Fortescue, and on Royal Ordinances, from which we learn, among other things, that the English "bill" comes from the French *billot*. After this the book next treats of the Monarchical period (16th century to 1789), and here it ends in 416 pages its first, and particularly to non-Frenchmen, probably most interesting part, namely, that concerning the sources of law in their relation to France.

The second part, or the History of Public Law, begins with an Introduction touching the origin of the Family, of Property, and of the State, with special reference to Keltic and German Institutions. Here McLennan, Morgan, and Laboulaye are laid under contribution, as well as Seebohm, J. Williams, Maitland, Digby, and Harrison, but there

<sup>1</sup> Cf. The "Intelligent Man" of Vishnu, Maine's: *Early Law and Custom*. p. 74.

is not as much reference to De Laveleye as might perhaps have been expected, although the work of Bagehot, H. Spencer and E. Ferri does not escape adequate notice. Even a questionable institution like the *Couvade*<sup>1</sup> is referred to, and Irish gavelkind, while Sir H. Maine is largely drawn upon as to the Niyoga, of which the Levirate is but a special case. Furthermore, due recognition is given to the researches of M. Bogisic in the matter of the Servian *Zadruga*. *La Gaule Romaine*, the *Epoque Franque ou Barbare*, and *L'Eglise sous l'ancien régime* are next treated of, and then follows a long and thorough summary relating to the elements of Society in Feudal Days. This brings to an end the first three *fascicules* containing some 768 pages, while in the fourth and last that has appeared, we have nearly 250 pages more upon the Monarchical Epoch, in which the Villages, Towns, Parliaments, Intendants, Advocates, and Imposts of the time obtain considerable detailed notice. The English Frankpledge, Sergeants-at-law and even the Select Vestry are discussed; but here M. Brissaud is not always<sup>2</sup> quite up-to-date. Upon the whole, however, it is matter for wonder how well he illustrates the history of the Institutions of his own country by those on our side the Channel, while his notes in almost all cases put those who want further information on the track to get it from acknowledged sources.

Judging from the 1,000 pages M. Brissaud has already published, the *farrago libelli* in its entirety will be extensive. He uniformly adopts the comparative method, or that of illustrating the growth of Institutions in France by parallel passages in the history of other countries. Perhaps he is not quite so happy in his Spanish and

<sup>1</sup> See an article by M. Brissaud on the *Couvade*, *Revue des Pyrénées*, 1900, pp. 225, *et seq.*

<sup>2</sup> *e.g.*, at p. 897, Note 5.

English references, as in those taken from Ancient Rome and Germany. As he gives us no table of contents, and as yet, of course by necessity, no index, and since his compendium has not even the homogeneous alphabetical arrangement of our own Bacon's *Abridgment*, but depends upon chronology not only in its Parts, but also in each Section, it is in its present inchoate condition not unlike a very excellent spade of the finest steel without even a wooden handle. Furthermore, although both Bentham and Austin are referred to *nominatim*, we do not learn that their splendid achievements in classification have been apprehended or had any influence in France. And yet, against these infinitesimally small shortcomings, some of which will, on the book's completion, remedy themselves, we have to set the exceptionally high grade of excellence of M. Brissaud's teaching as a whole. There may be a little too much here and there in the way of facts, especially for the stranger who is intermeddling in details of matters, to him, of minor historical importance; but if such a fault exists it is one upon the right side. As a whole the Manual is so good that to suggest improvement would be a counsel of perfection. It is to similar compendious summaries, except that of M. Viollet, what a proper science primer is to the Roman student's *cantilena* of the *Leges*, or a Modern Medical Text Book to the Aphorisms of the School of Salerne which tell that *Contra vim mortis non est medicamen in hortis*.

In brief, this particular Manual manifests throughout originality, much taking of pains, and a vast experience of students of legal history, their requirements, and the things that should be most surely believed by them, an experience, that is, of such matters as relate to the growth of the great France of to-day. The more it is read, marked, learned and inwardly digested by students of other countries, the more the aggregate stock of know-

ledge only to be got by means of the comparative method will be extended. \* In its light will they indeed see light.

A. R. WHITEWAY.

### III.—DEBT-SLAVERY IN THE MALAY PENINSULA.

(Continued from page 331.)

COMPARING the Roman with the Malay institution, it will be seen that there is no necessity, in the latter case, for any formality accompanying the loan. But it is probable that the use of the copper and scales at Rome was, in primitive times, not formal at all, but essential to the transaction. The exact incidents of nexal debt are not easy to ascertain, because of the difficulty of discriminating between nexal debtors and judgment debtors, both of whom were subject to *manus injectio*. But it is clear that *nexi* and *judicati* alike had 30 days allowed, in which to endeavour to pay the amount owing, the *nexi* being termed *damnati* by Gaius and (apparently) *aeris confessi* by Aulus Gellius. Some writers also think that *nexi* had the benefit of the further delay of 60 days which was accorded to *judicati*. It is interesting to observe, therefore, that in Malaya a period is fixed at the outset for repayment, and that a further grace of two, three, or six months is allowed after its expiration, before apprehension.<sup>1</sup>

The Roman creditor took the debtor before the judge ; but only as a precautionary measure, and to ensure the regularity of the proceedings, not with a view to any magisterial decree or trial. This requirement was introduced by the early statute of the twelve tables, and has no counterpart in Malay law. According to the Roman system, the judgment debtor finally became *addictus* to the

<sup>1</sup> Swettenham, P.p., 1882 (c. 3, 285), XLVI., 10.



creditor, and lost the opportunity of redeeming himself; but the better opinion is that this was not the case with regard to the nexal debtor, as such, who could consequently tender the sum owing, if he became possessed of it, and by this means at any time recover his freedom. A very remarkable analogy, however, to the Roman way of dealing with judgment debtors is afforded by a custom which obtained in the island of Sumatra, where the slave-debtor (then called *menjiring*) had the right of paying off the debt and enlarging himself, but could be deprived of this right, by the creditor's demanding formally the amount of the debt at three several times, allowing a certain number of days between each demand ;—when, if the debtor was not able to persuade any person to redeem him, he became a pure slave, upon notice being given, to the chief, of the transaction.<sup>1</sup> This only differs from the Roman *addictio* in not appearing to require the existence of a judgment to ground the process, and in the resultant status of the debtor, who does not seem, at Rome, technically to have become a slave.

In Malaya, some diversity of opinion exists as to the possibility of opening the foreclosure. Captain Speedy, in the extract quoted on page 332, says that if the debtor acquires or is supplied with the means of discharging the debt, the creditor may refuse to accept it when tendered. And another authority says—“Nor has the debtor under this system any means of becoming free, unless some relative or friend comes forward to pay for him; and even in this case the creditor might, if he so willed—and if he was a raja, in all probability would—under some pretext, refuse the offer of payment.”<sup>2</sup>

The words “under some pretext” show that this aspect of the institution was rather an abuse *pro loco et tempore*

<sup>1</sup> Marsden : *Sumatra*, p. 214.

<sup>2</sup> P.p. 1882 (c. 3,285) XLVI. 6.

than an inherent feature of the system. And this is borne out by Sir F. A. Swettenham<sup>1</sup>, who observes :—"Should at any time the debtor succeed in raising the amount of the debt, and proffer it to the creditor, then it would be customary to accept it. If, however, a large family were in bondage for the debt, one whose numbers seemed to the raja to add to his dignity, then he would probably refuse to accept payment ; not absolutely, but would say ' wait,' and the waiting might last for years." Later, at page 13, he says that the raja is " rather inclined " to refuse payment, should the debtor be so fortunate as to raise the requisite amount of his debt. This is not a very strong statement ; and we know that in Burma, as in Sumatra, tender of the debt could not be refused".

The motive of a creditor, especially in the case of a raja-creditor, for retaining the debtors, was not only to continue to enjoy their services, but for the pure pleasure of increasing his own consequence. We cannot fail to be reminded here of the troop of *clientes* who surrounded the Roman patrician. A raja's importance was measured by the number of retainers in his train. Of these (1) a few followed because they liked it, (2) others because they were genuine slaves (*abdi*), (3) others because they had been taken, " by the sending of the kris," into the raja's household ; and (4) the rest were slave-debtors. It was the dignity with which a large retinue of these invested the rajas, that induced them to reject ransom. At least this is the explanation usually given. It does not seem very consistent with the statement repeatedly met with in the official despatches, that when discipline over the debtors was relaxed, and their services thereby rendered less valuable, there was a general readiness to give them up. Sir W. Maxwell adds a fifth class (only in royal households,

<sup>1</sup> Ibid, p. 10.

<sup>2</sup> Malcom, *Travels in South-East Asia*. 229.

like the third) of criminals unable to compound for their crimes—this is practically indistinguishable from the fourth.

The *questio vexata* of the extent to which nexal debtors involved their families in their ruin, has some light thrown on it—if not much—by the Malay practice. Major McNair<sup>1</sup> says that, exceptionally, the security for the debt was arranged to depend on the life of the debtor alone. But he quotes no authorities; and the general rule was otherwise. The children and remote descendants of a *barutang*, whether born before or after the debt was incurred, fell into the same condition as their parent. Sir W. Maxwell is, however, of opinion that, so far as concerns children who did not consent to the debts being incurred, this was an engrafted abuse. But it was the same in Sumatra,<sup>2</sup> though not in Burma, where children had to be expressly implicated. As to the wife of a debtor, the same rule held—whenever the marriage took place. With regard to a debtor's husband, the rule is sometimes stated in the same form. But the true principle appears to have been, that it was only incidentally that a husband, as such, became bound: namely, by marriage to a slave-debtor, without paying the amount claimed on such occasions, as her price, by the creditor. That, of course, made him a debtor for the amount; and as the payment was immediately due, a slave-debtor. In point of fact, this nearly always happened, as it is not usual for the amount agreed to be paid on a Malay marriage to be discharged in a lump sum. The same result occurred in Sumatra,<sup>3</sup> where the *jijir* or *antiphrna* was left as a debt for which the debtor was *menjiring*: and years often elapsed there, if the families were on good terms, without the debt being

<sup>1</sup> *Sarong and Krtis*, 102.

<sup>2</sup> Marsden, *Sumatra*, 214.

<sup>3</sup> Marsden, *ut supra*, p. 219.

demanded. Marsden says it was not uncommon to see Sumatrans suing for the *jijir* of their great aunt.

If the married persons did happen to be, one free and the other a slave-debtor, the usual rule was applied, that the children followed the condition of the mother. This could only be (if at all) when it was the husband who was free: otherwise he would attract his wife into the same condition of debt-slavery in which he was.

Under these circumstances of family bondage, each individual was liable *in integrum*: and it was common for the children alone to be taken into the creditor's household, the parents being liable to follow them at any moment.

Instances are quoted, in the Parliamentary papers, of parents being bound for their children's debts, and a niece for those of her uncle. But it is tolerably clear that these are misconceptions; and that the parents were, in the first case, the original debtors, and the uncle, in the latter, a creditor of the niece or her parent, and so in a position to assign her as security for his own debts, by way of sub-mortgage.

Assignments of slave-debtors were quite common, and probably they might be made by way of security as well as otherwise, as Sir F. A. Swettenham remarks<sup>1</sup> :- "Bond-debtors are handed about from one raja to another without a thought of consulting them."

Accordingly, when Mr. Davidson speaks of redeeming a girl who had been mortgaged by her uncle to a Pahang man for 12 dollars to pay a gambling debt, it must probably be presumed that she had previously been assigned to her uncle, or seized by him, in discharge of a debt due by her own parents. But the peculiar relations between uncles and nephews renders it impossible to be certain that this is the right explanation. The crucial

<sup>1</sup> P.p. 1882 [c. 3428] XLVI. 11.

<sup>2</sup> *Ibid*, p. 9. Despatch of August 23rd, 1875.

case which was cited against a British official, in an unfortunate controversy with the Straits authorities, as one in which he had gone out of his way to deliver up slave-debtors to their owners, is explained on his behalf to have been one of delivery of nephews to their uncle. It is possible, therefore, that uncles had a kind of right of disposal of their nephews, which was practically confused with the right of a creditor. And there is an obscure passage in the Pôrak and Malacca laws<sup>1</sup> which deals with the position of persons placed in the service of their remote relatives, prohibiting them from escaping from their custody.

Again, when Sir F. A. Swettenham<sup>2</sup> quotes the case of Metia, who owed 56 dols., for which not only she and her three children, but also her parents, were bound in slavery, we must suppose that the debt was really incurred by the last named. It would be easy to imagine that this might be so, although the money might actually be handed over to Metia, and considered by her as her own debt, although, as between the creditor and the parents, the latter would be primarily liable. Nevertheless, it must be remembered that in Sumatra, the cradle of the Malay civilization, the "nearest relatives" were absolutely responsible for the debtor's engagements—at any rate after the latter's decease.<sup>3</sup>

Maxwell gives some interesting details as to the primitive working of the institution in its simplicity. The idea appears to have been to fix the average value of a subject at a fixed sum, which his effects were supposed to be worth. This, it seems, was 25 dols. More than this he could not be fined. If he engaged himself beyond the limit, an unpaid creditor was at liberty to assault and batter him, which

<sup>1</sup> Quoted in *Journal (Straits Branch) Royal Asiatic Society*. xxi., 261.

<sup>2</sup> P.p., 1882 [c. 3428] XLV L., 12.

<sup>3</sup> Mat-iden, *Sumatra*, 190.

licence seems to have been the origin of the more economical institution of debt-slavery. It follows as a corollary, that if the nominal value of the debtor's effects (25 dols.) was tendered to the creditor, the latter was fully compensated and must discharge the debtor. Much more must the debtor be discharged, on tender of the full amount owing. However, in practice, the 25 dols. limit was completely disregarded.

Maxwell says the custom is of Indo-Chinese and pre-Mahometan origin, and wholly opposed to Mahometan law. The text of the Quran quoted in support of this opinion is hardly convincing:—"If there be any debtor under a difficulty [of paying his debt] let [the creditor] wait till it be easy [for him to do it]; but if you remit it as alms it will be better for you, if you knew it. And fear the day in which you shall return to God; then shall every soul be paid what it has gained, and they shall not be treated unjustly."

To wait without any prospect of being paid, would be tantamount to compliance with the counsel of perfection which advises remission of the debt. It can hardly be supposed, with all deference to Maxwell's ability as a commentator on the Quran, that the passage cited means anything more than that a creditor is not to drive a debtor to extremities, when waiting would serve.

Redemption, it may be added, was frequently rendered more difficult, by the addition to the principal sum of amounts due for breakages, domestic fines, and so on. But the Borneo custom of adding interest to the sum owing<sup>1</sup> does not seem to have been adopted in Malaya. Possibly, in Borneo, credit was given for the debtor's services, in which case it would be only fair to set off interest against them.

<sup>1</sup>See Mr. Treacher's papers in the *Journal (Straits Branch) Royal Asiatic Society*.

It seems that the Roman *nexi* could be stolen; at any rate the *adjudicatus* could.<sup>1</sup> Probably the Malay law had some corresponding provision, but it does not clearly appear whether it was so or not.

The cruelties practised on *nexi* at Rome are well-known. The right to apprehend the debtor on failure to fulfil the "obligation of repayment, and, without any process of law, carry him home, and detain him, and employ his services as *de facto* (though not *de jure*) a slave. . . . had become frightfully abused; their *jus detinendi* being regarded by creditors not as affording them the means of obtaining through their debtor's industry substantial satisfaction for their pecuniary losses, but rather as entitling them to inflict. . . . every sort of cruelty and torture and indignity."<sup>2</sup> Perhaps this is to invert the order of ideas. Primitive peoples are not far-sighted; the idea of seeking a future recompense, for the loss of what is immediately due, is a somewhat complicated one. It may have been that quasi-slavery was an *adoucissement* of an original right of vengeance. At any rate, the cruelties to which *nexi* were subject were so great and so frequent that the Pœtilian law was required, to alleviate the position of borrowers, by abolishing the system, and rendering more tolerable the position even of judgment-debtors. Closely connected with this reform was the introduction of a much more drastic form of civil process (*condictio*) than any that had previously been in use; it would be curious to observe whether any similar phenomenon is apparent in those parts of the Malay peninsula in which debt-slavery has been abolished. No doubt the introduction of magistrates' courts affords, in some sort, a parallel.

As to the actual treatment of the slaves and slave-debtors, in Malaya, the difficulty of arriving at any satis-

<sup>1</sup> Gaius, *Institutes*, iii., 199.

<sup>2</sup> Muirhead, *ut supra*, p. 95.

factory conclusions is considerable. The earlier reports, written in 1874-5, are freely spiced with references to "this cruel practice," "barbarous custom," "crying evil," "gross and cruel abuse," "hideous practice," "wretched condition," and "torture"; so that one thinks the adjectives "revolting" and "eminently unchristian" (which one author uses) almost too good for it. It is somewhat surprising, therefore, to read the following passage in Sir R. Weld's despatch to Lord Derby dated May 3rd, 1883<sup>1</sup> :—

"The manumission of slaves is proceeding rapidly, but very few freedmen will consent to leave their masters or mistresses, whilst they on their part almost universally say that they set them free "for the glory of God," and refuse to take the State's money. 'How can we take money for our friends who have so long lived with us, many of them born in our houses? We can sell cattle, fruit or wine, but not take money for our friends.' Such expressions have been used in many cases in different parts of Pêrak. . . . In fine, this investigation has brought into notice many of the fine qualities of a most interesting and much maligned race, and affords conclusive proof that the abuses which are sure to exist with slavery could not have been general, and bore no comparison with those formerly often accompanying negro slavery in our own colonies."

This is sufficiently startling; but it is absolutely in accordance with Sir H. Low's uniform testimony from the time he was appointed Resident at Pêrak in 1877. Writing in 1878 (December 14th), he says<sup>2</sup> :—

"I cannot undertake to say what may have been the practice in former times, as to the treatment in Pêrak, of this class of persons; but no case of cruelty, or any great

<sup>1</sup> P.p., 1884 (c. 4, 192), LV., 9.

<sup>2</sup> P.p., 1882 (c. 3, 285), XLVI., 14.



hardship, has been brought to my notice since I came into the country. By far the larger number of the slave-debtors live with their families apart, and often at great distances, from, their masters, enjoying all the fruits of their labour, rendering occasional assistance to them when called upon to do so ; which in the majority of cases is of rare occurrence." He observed also that a scheme of voluntary emancipation initiated by himself ' fell through, partly because of " very many of the debtors, who are living in entire freedom in different parts of the country, declining to come into the arrangement though acknowledging their debts."

On April 26th, 1882, Low writes " :—"Further and more intimate knowledge of the people has confirmed the impression that whatever may have been the case in former times, cruelty to slaves or slave-debtors has been very rare since the establishment of settled government. Three such cases have occurred in the families of two very high officers of State ; and these, with one other case, are all the instances of cruelty which have been reported to me." And in 1884, detailing the results of emancipation " :—"With very few exceptions, the owners and creditors of the servile classes treated their dependants with the utmost generosity, and in the district under my own charge and in Lower Pérak . . . nearly all persons gave their slaves unconditional freedom, though they claimed and received a small compensation from debtors in cases where money was known and believed to have been actually advanced."

Four cases of cruelty, therefore, were all that came to Sir H. Low's direct notice in Pérak, from 1877 to 1882 ; though, writing in July, 1882, in answer to the charges of

<sup>1</sup> *Ibid.*      <sup>2</sup> *Ibid.* p. 18.

<sup>3</sup> P.p., 1884 (c. 4, 192), LV., 47.

favouring slavery which had been made against the Straits administration, he refers to "several" others, in which emancipation of ill-treated slaves or debtors was effected; these, as they had escaped his notice in his letter of April 26th, cannot have been very numerous or important.

So, Maxwell observes in the report already quoted, that since the commencement of the residency system the institution had been "much less" oppressive—and that in "some cases" where acts of oppression or ill-treatment had come to the notice of British officers, their influence had procured the release of the individuals affected. There would be few matters, one would think, known to British officers in Pêrak, which were not also known to Sir H. Low: so that the "cases" here referred to cannot have much exceeded four.

It is most probable, therefore, that the cruelties which are referred to by Swettenham, Birch, and Maxwell, as being practised by the creditors, were merely abuses consequent on the anarchic and disturbed state of Pêrak previously to 1877. Nothing is said as to any particular cruelty attendant on the institution in Pahang and the Negri Sembilan, when these countries successively accepted Residents. With regard to Sungei Ujong, no specific cases of hardship are anywhere recorded; and the same is true of Johore. In fact, it is Pêrak, and perhaps to a certain extent Sêlângor, which alone appear to have been the

<sup>1</sup> (May 27th, 1882). P.p., 1882 (c. 3,429), XLVI., 16 *et seq.*

<sup>2</sup> *Ibid.*, p. 5. To these cases Raja Idris refers in a letter to Sir H. Low, printed, P.p., 1882 (c. 3,429), XLVI. 6. Possibly they were cases of slight cruelty, only rendering it advisable to release the complainants, but not worth mention otherwise. "If anyone even so much as beats his slave in the least, you are sure to have him freed. For instance, I remember some time ago, a slave of H.H. the Regent was freed by you; and one belonging to a high chief in Kinta was treated in the same way, without compensation of any sort being made. While I have presided over the court in Kuala Kungsu, I have released many slaves and slave-debtors in the same way, in accordance with advice given by you."

scene of the objectionable excesses which are detailed in the official reports. Sir F. A. Swettenham says, in 1875:— "In different States this debtor-bondage is carried to greater or less extremities; but in Pêrak the cruelties exercised towards debtors are even exclaimed against by Malays in other States." This, by itself, would rather suggest that affairs elsewhere were bad enough; but there does not seem to be any evidence of such a state of things. Maxwell's testimony is that the system was productive of peculiar hardships in Pêrak, through injustice and oppression. And it is difficult to gather from the accounts supplied by the official publications, whether the highly-coloured descriptions of the condition of the debtors contained in them are to be taken as applying to Pêrak merely, or to all the states indiscriminately.

On the one hand, they are not expressly so restricted. Pêrak is spoken of as worse than the rest, but not so as to be beyond comparison. And it may be regarded as certain that in no part of the Peninsula was the lot of the slave-debtor invariably a bed of roses. On the other hand, one cannot find any reference to specific cases of cruelty elsewhere than in Pêrak and Sêlângor; and, what is more significant, in Perak itself, after the anarchy which formerly prevailed there had been put an end to, by the war of 1875-76, cruelty ceased, as it did also in Sêlângor, as if by magic. Only four cases worth notice were ever reported to Sir H. Low, as resident; and among his subordinates were many whose sympathy with slave-debtors was well known. It does seem as if the specially bad features of the system were peculiar to Pêrak, and due to the general disorganization which prevailed in that State. Each little Raja was a law to himself; and as he required a body-guard, by whom his orders would be implicitly obeyed, in order to maintain his position, he treated his slave-debtors "with a severity which sometimes made death the penalty

of the slightest offence." Such is Sir F. A. Swettenham's description of the harshness with which the debtors were treated. Pérak, in short, was a feudal State. The Rajas were comparable to the robber-barons of mediæval Germany. They exacted, as every military State must, the extremest penalty for desertion; and they ruled their followers, as every military sovereign must, with an iron hand. Their quasi-independence abolished, their rigorous rule naturally lost its *raison d'être*. It is exceedingly remarkable, nevertheless, with what rapidity and ease cruelty to debtors disappeared. Parts of Pérak were long in coming under the direct influence of the resident and his officials. Into many regions it was for years dangerous to penetrate. Surely one would have expected a struggle: that, even if the grossest enormities were not repeated, there would have been many cases of lesser, but great, cruelty; that there would have been a campaign of more or less tedious police and detective work, resulting in a gradual amelioration of the condition of the slave-debtors. No such thing happened. Cruelty at once became a thing of the past, with the instructive exception of four cases during five years in the household of the regent and others, under the immediate eye of the resident officer. Can things have been, after all, not so bad as they were painted?

Dennys, in the standard Dictionary of Malaya ("Debt-Slavery") limits the exercise of cruelty to cases of absconding, and says that the slaves are otherwise well-treated. May it therefore be possible that the harshness of the rajas of Pérak may have been overstated? It must be remembered that they were exceedingly numerous, and formed perhaps the bulk of the creditors. Yet it was of Pérak that Weld's idyllic picture—"We cannot take money for our friends"—was written. It is impossible to

believe that ten years could have produced such a change in the sentiments of the creditors.

Let us consider, a little more in detail, the position of the slave-debtor as described by the writers already referred to.

First of all, they were free (*mardjlika*). In the eye of the law they did not come within the designation of *abdi* (slave), and were under none of a slave's disabilities; their proper style being *kawan* (companion). And, indeed, with reference to Burma, Malcom says that: "In a country where rank is never for a moment forgotten, and where a master has the powers of a magistrate over all his dependents, servitude creates a boundary which is in no danger of being passed. The effect is to make the servant, in many cases, the friend and companion of the master to a degree not ventured upon by masters in countries where employment does not create dependence, and where familiarity may induce assumption."

Their ill-treatment falls under three heads: (1) capricious cruelty, (2) severities consequent on detention and forced labour, (3) want of food and clothing. As to the first, there is not much to say. Ill-treatment for the mere pleasure of it does not seem to have (in historical times) been a characteristic of the Malay feudal courts. The Malacca law quoted by Maxwell<sup>1</sup> gives the creditor liberty, when the debtor's liability exceeds his nominal value, to beat and verbally abuse him; but, it is quaintly added, after the manner of a free person and not of a slave. It does not seem that such primitive methods of revenge were resorted to, after the discovery that it was more profitable to exact work from the debtor. The two remaining heads are the important ones. The first resident in Pérak talks<sup>2</sup> of the children being "constantly beaten and ill-used"

<sup>1</sup> Report *ubi sup.*

<sup>2</sup> P.p., 1882 (c. 3, 285), XLVI., p. 6.

in connection with household and agricultural work, but does not mention that the same suasion was applied to adults, except in the case of their absconding. Maxwell, however, 'says that a raja's dependents might be beaten and tortured, and if slaves [not debt-slaves], killed; whilst Sir F. A. Swettenham,<sup>2</sup> speaks of debtors "toiling away their lives amidst blows and upbraidings," as though this were the normal course of events, and he quotes the case of Metia (before-mentioned), who "seemed utterly miserable. The Toh Bandar, she said, was fairly good to them, but . . . his wife it was impossible to bear. Herself and her children, whilst made to do any work they could do, were abused and beaten, and were made to sleep in the Bandar's house, to prevent their running away during the night." This is the only specific instance given; and it has already been suggested that, in the then condition of Pêrak, opportunities were afforded for sporadic acts of cruelty, and a spirit of familiarity with outrage was engendered, which occasioned a quite abnormal set of conditions. And, indeed, creditors were not without cause for a certain amount of drasticness, which might easily be made to wear the colour of cruelty in a sympathetic mind, in their treatment of the debtors. The latter were incurably lazy. A Malay has no enthusiasm for work. The Chinese are the mining, the British the administrative, the Tamils from Southern India the menial, classes of the "Protected" States. The native inhabitants prefer to subsist on the plentiful produce of the soil, in dignified reserve. Tentative efforts to effect a voluntary scheme of emancipation fell through in Pêrak, "from the impossibility of inducing the debtors to work regularly," and (as has been observed) from the unwillingness of many of them, who were practi-

<sup>1</sup> P.p., 1882 (c. 3429) XLVI., p. 16, &c.

<sup>2</sup> *Ubi supra.*

cally living at large, to enter into any more onerous scheme, for the mere satisfaction of losing the name of *barutang*. And a memorandum<sup>1</sup> attributed to Mr. Innes, but which is said by Mrs. Innes<sup>2</sup> to have been a note of some remarks of the Resident's, speaks of the servile classes as extraordinarily lazy, from their nature and the easiness of their owners, and asserts that they would not earn enough to keep themselves.

Escape was visited with heavy penalties in some cases. But it is extremely hard to say what the actual practice was. When Sir F. A. Swettenham says that the received custom was to inflict a slight penalty only, it may be assumed that this was the usual course. When the same writer adds that that would not deter a raja from killing such a debtor, and, further on (page 11) that the debtor who is caught runs a "great risk of being put to death," it must be taken that he is referring to an exercise of kingly, rather than creditorial, power. He especially relies on the case, then two years old, of three children who escaped and who were killed by order of the second son of the ruler of Sēlāngor, under circumstances which he details at length. It is rather a weak instance, for the Sultan at once afforded signal marks of his disapproval. Another son had, six months later, killed a slave-debtor for an expressed intention of theft. One is tempted to inquire whether any other instances of the kind had occurred in the two years in question. And, if not, it would scarcely seem that in the disturbed circumstances of Sēlāngor—which were hardly less unsettled than those of Pêrak—the fate of the debtor was very frequently the *kris*, even at the hands of an offended despot. Flight, according to Sir Athelstan, "often happened." It may be added that the act of Sultan Yūsuf seems to

<sup>1</sup> Date, 26th December, 1878. P.p. 1882 (c. 3429), XLVI., 7.

<sup>2</sup> *The Chronicle*, I. 236.

have been remembered, and quoted with horror, for years as an instance of exceptional barbarity, when he put—as the story ran—boiling water and an ant's nest on an absconding slave. This happened long before the British occupation, and was talked about for long afterwards.

The third head is one of which a great deal is made in the accounts we have of the practice. Shortly stated, it is that the creditors, while occupying the time of the debtors in work, allowed them no money, food or clothing; and consequently drove them to theft and less creditable means of subsistence. Here, again, we are met by the united testimony of Sir F. Weld and Sir H. Low that the debtor-slaves were, as a rule, capable of doing considerably more work than was expected from them by their creditors. The former, speaking of Sēlāngor<sup>1</sup>, declares that the only difficulty experienced there, in carrying out a scheme of emancipation, was the “unwillingness of many of the slaves themselves to go and work for a living which involved greater exertion.” Precisely the same difficulty helped to render fruitless a similar scheme initiated by Low in Pêrak. This was after the owners' liability to feed and clothe the debtors had been recognized in the manner hereafter to be described; but it shows that the work exacted from them left a tolerable margin which they might have employed for their own benefit. For, at that time the resources of theft and plunder were no longer open to them; their owners had to clothe and feed them, and consequently must have been fairly entitled to make the most of their services. Yet their work, in the opinion of the high officers just quoted, was less onerous than it might well have been. The compulsion to work, certainly, was not as stringent as in the old days; but it must have been adequate—otherwise owners would not have cared to

<sup>1</sup> P.p., 1882 (c. 3285), XLVI., 17.



maintain a crowd of idle dependents, and Sir H. Low's<sup>1</sup> repeated declarations that it would be unjust to deprive creditors of the right to their debtors' services, to which by immemorial custom they were entitled, would have been perfectly nugatory.<sup>2</sup> Moreover, their position, even then, was such that they still occasionally kept escaping, when they saw a chance of evading their responsibilities and constraint; and when emancipation came, Sir H. Low (the Resident) could speak of it<sup>3</sup> as a revolution in the habits and ancient customs of the people.

Emancipation, indeed, provoked the only approach to insurrection—the Lombok affair—that Pêrak ever indulged in.<sup>4</sup> May one therefore believe that it was rather the Malay aversion from work, than want of time for it, which made the slave-debtors prefer to practice the fine arts of theft and highway robbery—for the exercise of which accomplishments the anarchic state of the country offered such brilliant opportunities to a hanger-on of royalty—as a means of subsistence? The remarkable memorandum must be kept in mind, which, shortly after the establish-

<sup>1</sup> Mem. of May 28th, 1878 (P.p., 1882 (c. 3285), XLVI., 5) Do., Dec. 14th, 1878. (*Ibid.* p. 15). Do. July 1st, 1882 (*Ibid.* c. 3429), XLVI., 5).

<sup>2</sup> Maxwell (Sir W. E.) says that, after the residency system began, the owners had "generally been powerless to enforce the ancient laws against their slaves, or to obtain their enforcement through the British officers." He adds that they could no longer compel the debtors by force to work, nor penalise them for disobedience or misbehaviour. It is quite impossible to reconcile this statement with the above referred to declarations of Sir H. Low, or with the fact that slaves and debtors still went on absconding and being handed back to their owners. And Maxwell himself suggests, as one way of abolishing slavery (which, as too revolutionary, he does not recommend), that it might be enacted that any act done towards a slave should be penal, if it would be so, if done towards a free person. If owners had already lost the power of doing acts towards their slaves to compel them to work, or of taking disciplinary measures in respect of misbehaviour, it does not seem obvious what difference would be the result of such an enactment. Maxwell also says that there was "little" harsh treatment—the fact that any harsh treatment was possible is inconsistent with the idea that discipline was impracticable. (P.p. 1882, c. 3429, XLVI., 20.)

<sup>3</sup> P.p., 1884 (c. 4192) LV., 47. Despatch of February 27th, 1884.

<sup>4</sup> P.p., 1884 (c. 4192) LV. 9. Weld to Derby, 25th May, 1883.

ment of the new state of things records the easiness of the creditors, the "extraordinary laziness" of the debtors, and the probability of their maintaining themselves by illicit methods if emancipated.<sup>1</sup>

The orthodox view to the contrary is maintained with emphasis by Sir F. A. Swettenham, Miss Bird and others, and in face of opinions formed on the spot by such excellent authorities, any such suggestion as is here made, must be put forward with the utmost reserve. But it seems difficult, if not impossible, otherwise to reconcile the fact that debt-slaves were required by their owners to do less work than they would have had to do if freed, with the admitted fact that the custom was interfered with as little as possible, the slaves being only emancipated in cases of real cruelty, or something approaching to it. And it does not look as if the slave-debtors had been accustomed to a life of engrossing toil, when they refused *en bloc* to accept freedom (from a less exacting servitude, perhaps) on the terms of doing a certain amount of hard work. It is, moreover, inconceivable how it could be said that, under Malay rule, few Sēlāngor rajas could *afford* to keep slave-debtors (as is stated in the Parliamentary Papers of 1882—c. 3285, XLVI., 13),<sup>2</sup> if it need have cost them nothing to do so. The writer cannot have meant that the Sēlāngor rajas did own them, and left them to shift for themselves, because he is quoting the fact as a reason for the non-prevalence of debt-slavery in Sēlāngor. In the same report it is stated that in Pērak "the raja *usually* provides food and clothing," though with the qualification that "*often*" the raja gives nothing." Subsequently it is explained that in the

<sup>1</sup> *Supra*, p. 422.

<sup>2</sup> Report dated July 30th, 1875.

<sup>3</sup> Which Maxwell expands into "more often"; speaking, apparently, of the whole Indian Archipelago. Such a statement can hardly be accepted, in view of the general consensus to the contrary.

case of fighting retainers, who add to his consequence, food and clothing are "usually" found—but surely all of his slave debtors were of more or less use to him? In the case of aged people, too, he was not too far sunk in his reprehensible iniquity, not to be sensitive to the imputations which would attach to him if he turned them out to starve; and the callous taskmaster fed and clothed these useless dependants. As to the rest, all the writer says is, that "some" of the chiefs in Pérak did not provide food and clothing. This is hardly sufficient, on the whole, to justify us in laying much stress on the word "often" in the qualification above quoted. The writer of the report takes the trouble to detail an incident<sup>1</sup> relating to two debtors of a Langat raja, who had been supplied with no food or clothes, according to their own account. Why this single case should have been expatiated upon, if the practice was a common and widespread one, is hardly apparent. The only other specific case mentioned in the Parliamentary papers is that of the Toh Bandar's debtor, before referred to.<sup>2</sup> The disjointed story recounted in Mr. Birch's report of 28th July, 1875, is too vague to be seriously considered.

That, by abuse of the system, debtors were sometimes not supplied with food and clothes, is clear. But it does not seem to have really happened so very often. The occasional instances in which it did so, were more noticed than the many in which it did not; just as it is the abnormal, unusual crimes and excitements which fill the columns of our own newspapers. And the consequence in the way of evil courses entered on by the debtors, cannot fairly be laid entirely at the doors of their employers, in any case; but rather may be attributed, in a great

<sup>1</sup> P.p. 1882 [c. 3285] XLVI., II.

<sup>2</sup> Supra, p. 421. "He hardly ever gave them food, clothes or money,"—nevertheless, in Pérak, "she could just exist,"—apparently *without* illicit courses; for "in Selangor it would be impossible," and the theory requires that, with illicit gains, it would be possible anywhere.

measure, to the customs of the country, and the inclinations of the servile caste. A Malay steals innocently, and—only the word is so inappropriate in this connection—openly. Theft comes naturally to him, when the necessity for it arises. If he “gets jail” for it, the Malay no more understands the connection between the two phenomena, than a European understands that which subsists between insanitary premises and typhus. It may be added that food and clothing were always given in Sumatra, the original home of the Malays.<sup>1</sup>

On the whole, then, the debt-slaves were well treated—even the raja-slaves of Pêrak ; who were the worst off. We have seen from Sir H. Low’s account that the bulk of the debtors resided in their own farms, away from their nominal owners. This was the normal way in which the institution worked in other countries where it subsisted. Thus, in Burma, Malcom informs us<sup>2</sup>—“Many slaves live at their own houses, just as other people, but liable to be called on for labour, which in many cases is required only at certain seasons of the year.”

Major McNair, in treating of the harîm-slaves, speaks, with some originality of expression, of “a very rugged and cruel drowning, for the sultana who dares to rise in spirit against her lord”;<sup>3</sup> but the sultana of thirteen on whose fate this dictum is based, was the escaped Sêlângor slave-child to whose pathetic end reference has already been made ; and it has been shown that this was an isolated case,—an outburst of princely brutality, promptly and severely condemned by the sovereign authority. As far as the general treatment of slave-debtors goes, we have Major McNair’s testimony, that (although he agrees with

<sup>1</sup> Marsden, *loc. cit.*

<sup>2</sup> *Loc. cit.*

<sup>3</sup> *Sarong and Kris*, p. 296.

Marsden that the system is capable of terrible abuse) “on the whole the *régime* under which the slave lives is mild, and not disadvantageous.”<sup>1</sup>

This was also the case in other countries in the neighbourhood where the practice prevailed. In Burma, says Malcom,<sup>2</sup> “slaves are not treated with more severity than hired labourers. A state of society where the modes of living are so simple, renders the condition of the slave little different from that of his master. His food, raiment and lodging, among all the middling classes at least, are not essentially different. Being of the same colour, they and their children incorporate without difficulty with the mass of the people on obtaining freedom. The same fact tends to ameliorate their condition. In fine, their state does not much differ from that of hired servants who have received their wages for a long time in advance.” And in Sumatra, according to Marsden,<sup>3</sup> the creditor allows the debtors subsistence and clothing, and cannot strike them. The custom in Borneo was likewise for the debtors to be treated as members of the creditor’s family, and even, Treacher says,<sup>4</sup> to be supplied with native luxuries. He adds that, “as a rule slaves have quite an easy time of it.”

And, indeed, the existence of much gross cruelty in Malaya would have been a moral miracle. There is no country in the world, except perhaps Japan, where children are so scrupulously well treated. It is said to be an unheard of thing for a child to be struck. And an adult Malay resents a blow like a wound, and is not particular as to the method or the consequences of revenge. “They

<sup>1</sup> *Ibid*, p. 102.

<sup>2</sup> *Loc. cit.*

<sup>3</sup> *Loc. cit.*

<sup>4</sup> *Journal Royal Asiatic Society (Straits Branch)*, xxi., 88.

are such horrible savages " says an old traveller, " that if you strike them, they will retaliate."

*Cet animal est très méchant ;  
Quand on l'attaque il se défend !*

As sensitive as the English with regard to their personal honour, it is not to be believed that they would put up with unlimited severities. " The very meanest of the people," Crawford says, " are as impatient of a blow as any modern European gentleman." <sup>1</sup>

Perhaps as conclusive a testimony as any, to the mild character of debt-slavery in the bulk of cases, is to be found in the negative fact, that it makes no figure whatever in the charming sketches of Malay life, which have proceeded from the pens of Sir A. Swettenham and Mr. H. Clifford. Every picturesque feature of the customs and habits of the Peninsula has furnished material to these accomplished and sympathetic writers for an idyl or a tragedy. But not debt-slavery. Indeed, " it is hardly referred to. It will be remembered, again, that Pahang came under British influence only very recently. Previously, and for some time afterwards, the institution was in full force. Yet no case of cruelty to slave-debtors, there, is recorded in the Parliamentary Papers. The same is true of the Negri Sembilan." And one may search through and through the files of the *Journal* of the Strait Branch of the Royal Asiatic Society, without finding the remotest allusion to the custom in any shape (except that it printed Sir W. E. Maxwell's report, which has been so often cited).

Was it wise to abolish the practice, and to substitute, for the home of the private creditor selected by the borrower, the ultimate resources of civilisation, the work-house and the jail? It is probable that, as the country

<sup>1</sup> *Loc. cit.*, iii., 105.

<sup>2</sup> P.p., 1888 (c. 5566), LXXIII., 137 : Report of the Hon. M. Lister.

became settled, and property more diffused, the institution would have died out, in process of time. As Crawford says, in the *History of the Indian Archipelago*<sup>1</sup> it arose most naturally in an atmosphere of anarchy. "When any country is distressed by war, famine or intestine commotion, hundreds of the lower orders mortgage their services to people of rank and influence, who can afford them subsistence and protection, just as the peasantry of the middle ages of Europe were wont to make a sacrifice of their personal liberty to obtain the countenance of religious institutions and of the nobility. This is the origin of a class, very numerous among some of the states."

It was in times of anarchy that debt-slavery flourished best. Itself an anomaly, it was not free from abuses. But it would be as reasonable to abolish off-hand the rights of parents over their offspring, because children are not always kindly treated, as to do away with debt-slavery, on account of the evils which attended it in a corrupt state of society.

However it is enough, to condemn a native institution, to give it a bad name, and in all the British States—(which it is absurdly misleading to style any longer, in accordance with common usage, "Protected")—it has been abolished. It only remains to note the steps by which this was effected.

In Sungei Ujong, it went by the board at once. The Datu Klana owed his seat to British help, and although the custom was not formally abolished, "claims on hereditary debtors were so strongly discouraged, that it died a natural death"—as we learn from the Resident's memorandum of April 28th, 1882<sup>2</sup>. It seems that some process of

<sup>1</sup> Vol. III., 39.

<sup>2</sup> P.p., 1882 (c. 3285), XLVI., 19. See also the Straits governor's qualified adoption of these statements: p. 17.

balancing claims against services was gone through, and in most cases the latter, as was natural, preponderated, or left only a small margin for the debtor to pay. What one would have liked to know is, what was done when they still left a substantial sum owing. Did the debtor and his documents remain recognised *barutang*? And if not, how did the custom die a natural death? Anyhow, from the arrival of the second Resident in 1881, it is recorded that no attempt had been made to revive what are ambiguously described as "claims of this sort,"—presumably those which had been declared satisfied by the services rendered. Although some (formerly) so-called debt-slaves, says the Resident, and their families, were living in the same village with their [late?] creditors, it was understood by all parties that no claims could be made, either for services or money. It is added that the custom then seemed as extinct as if it had never existed.

In Sēlāngor, things paused a little more formally. In a remarkable despatch<sup>1</sup> in which the Resident puts forward, as the proposition of the Sultan, an elaborate scheme in which the latter is immediately afterwards said to have "acquiesced," that officer reports that he has been enabled "to sweep away a custom that was alike objectionable and illegal." He appears to think that, in doing so, he had "avoided any active interference with the customs of the country,"—but as he subsequently observes that no public notice had been given of the "abolition of the custom," but that it was left to be inferred from the practice of the Courts, it is at once apparent that the influence, if not active, was effectual. It was possibly all the more so, inasmuch as there was little debt-slavery in

<sup>1</sup> P.p., 1882 (c. 3285) XLVI. 3; and see Ibid. 17 (Weld to Kimberley, May 4th, 1882).



Sēlāngor. The old population had been rooted out, and returning in driblets, did not insist on its old rights<sup>1</sup>.

The principal feature of the system appears to have been that the debtors were allowed to work off their debts, as more or less free servants. In Pērak, Sir H. Low was referred to this procedure of the Sēlāngor Resident as a good model. But he took a different view of his Sovereign's engagement not to interfere with the custom of the country. The only innovations which he felt at liberty to introduce were (1) the prevention of any fresh cases of slave-debtorship; (2) the clear recognition of the principle that a debtor might redeem himself, by payment of his debt (apparently without allowing for the value of past services). Low refused to introduce the scheme which was the pivot of the Sēlāngor plan, the setting-off of services against principal. He secured that the debtors should be well-treated, fed and clothed; and he made tentative efforts towards a voluntary trial of the Sēlāngor emancipation system. As has been seen, these fell through; on account of the unwillingness of the debtors to work, which was such that any time judicially fixed for them to serve could not easily be accepted as fair, or, indeed, as anything more than a hopeless guess.

The way to meet this difficulty was obvious. If nobody else can be trusted to combine justice with mercy, the State official in a uniform can always be relied upon for the proper amount of virtue. Whether we want children educated, or factory-hands healthy, or pepper clean, he is always ready,—so receptive, so free from prejudice and self-interest, and so very civil! The *barutang* would not work out their freedom under the lax rule of their owners, let

<sup>1</sup> Report of Swettenham, 30th June, 1875. P.p., 1882 (c. 3285) XLVI. 13; and Report of Davidson, 23rd Aug., 1875. *Ibid.*, p. 9.

<sup>2</sup> *Ibid.*, p. 14.

them then do so under the *corvée*! The bureau can do no wrong.

On October 9th, 1882, a scheme of emancipation was introduced into the native Council.<sup>1</sup> It included ordinary slaves, about whom we need not trouble. The maximum value of a debtor's services was fixed at 60 dollars, so that debts were practically wiped out in so far as they exceeded that sum. But the value of each debtor's services up to the end of 1883 was fixed at *half* the assessed total amount his services were worth. A debtor whose services for life were rated at 40 dollars got credit for half of it, therefore, by fourteen months' work. It seems a little curious, but Malayan arithmetic may perhaps yield these results. Possibly the old Sumatra idea was in the minds of the framers of the scheme—that the period of detention should be limited to two years. If the debtors would not work hard enough to satisfy the creditor, they might be handed over to the tender mercies of the public works authorities. It would be interesting to learn whether these regarded themselves as bound by the principle that the debtors ought to be set unconditionally free if they were "beaten in the slightest," in Raja Idris' words.<sup>2</sup> It was also provided that debtors might, if they chose, elect to leave their creditors, and be employed in the public works. It will be seen that the other half of the assessed and limited value of the debtor's services remained to be raised. It was paid from the resources of the State, and therefore the creditors compensated themselves to a certain extent out of their own pockets. However, the State retained a claim on the debtors for the amount so advanced, and took it out of them at the public works.

These regulations were embodied in an order of October 10th, 1882, and were the occasion of the usual official

<sup>1</sup> P.p., 1884 (c. 4192), LV., 1.

<sup>2</sup> *Ante.*, p. 417, Note 2.

congratulations. But they will not be regarded as the crown of Sir H. Low's work in Pêrak, which was a very great deal deeper and more valuable than this rather showy measure.

In the Negri Sembilan, it really can hardly be said what happened. The history of their annexation is obscure, and there were seven or eight of them, owning a kind of superiority in the Iam Tuan of Sri Menanti. That potentate, soon after he was annexed, abolished debt-slavery, as a compliment, which he thought would be appreciated, to the Queen of Great Britain on her completion of fifty years of her reign.<sup>1</sup> His immediate decease prevented the scheme from being carried out beyond the circle of his own domestic household. It apparently consisted in converting the slaves into servants at a fixed wage: *i.e.*, practically to give them credit for their services, for one can scarcely believe that they were intended to have the liberty of leaving their employment. A more complete scheme was carried out in the name of his successor. It does not appear clear what the details of this arrangement were. The resident (the Hon. M. Lister) reports that there was a strong feeling in the country against allowing rice-fields to lie uncultivated. Wealth was estimated in (properly worked) fields and buffaloes. Consequently there was not the same danger as there was in military Sêlângor, that slave-debtors would adopt an idle life, if they were given lands to cultivate for their owners. Such appears to be the drift of Lister's argument, though it is not very easy to make out, when he remarks that the sentiment of the country in favour of agriculture makes it feasible there to abolish debt-slavery, whilst improving the condition of former slaves as compared with that which would follow on emancipation.

<sup>1</sup> P.p., 1888 (c 5560), LXXIII., 137 Report of June 21st, 1888.

It will be seen that the former "slaves" were expected to do a good deal of work, and were by no means considered as emancipated.

So far, good. But when we come to 1889, we find one of the official reports observing that domestic slavery was abolished in 1887 in the Negri Sembilan "by the free act of the then ruler of Sri Menanti."<sup>1</sup> How the ruler of Sri Menanti could abolish anything in the rest of the confederate states is not explained. Certainly in Jëlëbù, the process was independent, and prior in date. On November 9th, 1886, a meeting of the chiefs agreed to abolish slavery, and the Datu Pëngulù issued notices declaring it illegal after January 11th, 1887. It was supposed that the compensation would be very trifling, but it is not stated on what principle it was assessed or secured.\* As for the other states of the Negri Sembilan, there seems no extant account of their repudiation of slavery, as there is no adequate one of their annexation.

In Pahang, which was only annexed in 1888, the authorities set themselves at once to do away with the system of debt-slavery, "under which not only the debtor, but his wife and their more remote descendants were condemned to hopeless bondage."<sup>2</sup> The development of Pahang was very slow; whether this is to be traced to the pressure which was put upon the Sultan, from the first, to uproot this fundamental institution of the country is a question well worth inquiring into by anyone who has access to the necessary archives.

There were four or five thousand slave-debtors in Pahang: and they were treated even in that wild country with much less severity than the ordinary slaves, according

<sup>1</sup> Report by the Straits Administration to Visct. Knutsford, July 10th, 1890. P.p. 1890-1 (c. 6222), LVII., 10.

<sup>2</sup> P.p., 1887 (c. 4958), LVII., 130. Weld to Stanhope, 25th November, 1886.

\* Report on Pahang, *Ibid.* p. 92. P.p., 1890-1 (c. 6222), LVII., 78.

to the Resident. They could not be bought and sold, though they were liable to be assigned to any person paying their debts—a proviso which, it is logically added, renders their freedom from sale “somewhat” illusory. The scheme of emancipation adopted by the Pahang Council, provided for the extinction of debt-slavery in about six years—not two, as in Pérak,—and the owners were not to be compensated by the State, but by giving credit for the debtor’s services. Pahang being so little advanced, the expedient of the *corvée* was not available; and the inevitable dilemma rises, of the impossibility of seeing that the debtors did a fair amount of work. How it was got over—if at all—does not appear.

The Dutch appear to have abolished the institution, in Java and Madura,<sup>1</sup> if not in districts less fully under their control.

In Siam, debt-slavery was until recently in full force. Mr. Dauge, an ex-official of the court of that monarchy, states the following as facts current, in or about 1899:—

1. Killing debt-slaves is unknown.
2. Excessive ill-treatment is illegal, though recalcitrant debtors may be beaten, chained or imprisoned.
3. Food must be provided, even when the debtor is past work.

A scheme of emancipation has been prepared by the King (Chulalongkorn), its main features being:—

1. Interdiction of such slavery, in the case of persons born after Chulalongkorn’s accession.
2. Gradual payment off of the debts of slaves by their services (valued at six francs, or four ticals, per month).

Apparently the valuation is net, and is not subject to a deduction for cost of food and clothing.

<sup>1</sup> *Journal R.A.Soc. (Straits Branch)*, xi., 62.

<sup>2</sup> Clunet: *Journal du Droit International Privé*, 1900, p. 703.

Whether this plan of emancipation also applies to what are called the Siamese Malay States, seems hardly certain. These are states standing to Siam in much the same relation as that which the countries of which we have previously spoken bear to Great Britain. Siam has, at various times, claimed less or more authority over all the states in the peninsula, including Pêrak. And she is now sufficiently recognised as a full member of the family of nations to make it impossible to treat her claims with a high hand. Quêda, therefore, on the west, Ligore and Songh-khra (Italianized Sêngôra) on the east, have been left to Siam to civilise, together with other provinces to the north of them. Sêngôra is, indeed, almost incorporated with Siam. Of these states, a recent traveller<sup>1</sup> says that, "the administration of the Siamese Malay provinces is on the whole very good and suitable to the people, more so, possibly, in some respects than our own in the British protected native states, and reflects great credit on the Siamese." The Siamese have not, in days past, behaved too well to Quêda; and it is pleasant to know that things are different now. It does not appear whether the Siamese have extended to these States their own recent scheme of emancipation just detailed.

Quêda marches with Pêrak. But on the east coast the Siamese States are divided from Pahang by the buffer states of Trêngganu, Kêlantan and Patâni. Great Britain is restrained from interfering with these, it is not unlikely, because of the jealousy which anything like an encroachment on Siam would create on the part of France. Although these states are genuinely independent, Siam might, and probably would, raise claims of suzerainty over them which it might be difficult to disprove. Con-

<sup>1</sup> Louis: *On the Telubin* (Royal Geographical Society's Journal, III, 228.)

sequently Kelántan and Trèngganu remain in semi-barbarism<sup>1</sup>.

The Kèlántanese is said to be the Cretan, and the Trèngganese the Gascon, of the peninsula—if, indeed, the latter does not dispute the title with his neighbour of Pahang. Few Europeans have visited their territory. Mr. Clifford, than whom there is no more competent authority, asserts<sup>2</sup> that in Kèlántan the debt-slave system is carried to a greater length than in Trèngganu. Here, and in the more northern district of Patáni (if not also in the remoter possessions of Holland), the interesting institution whose working we have been describing must be looked for, if the observer wishes to study it in active operation. It may be too late to arrest its decay. On the other hand, considering the favour with which forced labour is regarded in South Africa, Queensland and elsewhere, it seems clear that the British repugnance to slavery regards the word a great deal more than the thing. In view of the unsatisfactory character of our own bankruptcy legislation, it is not impossible that Trènggalu and Kèlántan, when they come into the sphere of Western civilisation, may retain the institution of debt-slavery. Due provision would, of course, be made for safeguarding the natural rights of the debtors. A tolerable expedient might be to give creditors coercive powers only over debtors whose conduct had been found unsatisfactory by several successive assignees of the debt. It need scarcely be necessary to secure to debtors that credit should be given for their services. These are not likely ever to be capable of satisfactory assessment. And the debtor incurs the debt voluntarily, and knows the consequences. Government loans might well be made to

<sup>1</sup> It is said that a Siamese Resident was placed in Kelántan, in 1899. Annandale, *The Siamese Malay States* (Scottish Geographical Magazine, XVI. 522).

<sup>2</sup> *Journal of the Royal Geographical Society* IX. 36.

deserving persons : there is no reason why the State should not enter into competition with other money-lenders. But as society becomes more complex, as money-lending becomes a business, and personal assets more numerous and valuable, and skilled services commanding a high rate of remuneration develop, the system will probably sooner or later disappear.

As it is one which casts considerable light on obscure problems of comparative law, the scientific jurist will hope that its continuance will for many years prove compatible with the true interests of humanity. Meanwhile, there is every reason why its working should be carefully and dispassionately examined. As has been indicated, the greatest danger to its existence does not now lie in humanitarian sentiment, grounded on false analogies with negro slavery, and stimulated by abuses which are not properly incidents of the practice. It lies rather in the modern exaltation of the State, and in the tendency to break up domestic and quasi-domestic ties, and to hand over the functions connected with them to the supervision of a bureau. If this arbitrary and unsocial tendency can be resisted, and if the custom can only succeed in getting itself styled *barutang*, or indentured debtorship, or companionage, or something equally agreeable and respectable, there is still a future—if a limited one—for debt-slavery.

The events which have been recounted, as attending the establishment of British rule in Pêrak, happened twenty-five years ago. Till the secret history of those times is written, it must remain impossible for anyone, writing with the best intentions, to be secure from totally misapprehending the true nature of events. If, therefore, the present writer should have fallen into mistakes, or should have estimated wrongly the value of competing authorities, all that remains is to ask the critic to believe



that the foregoing pages have been written with the sole purpose of arriving at and elucidating the truth, with regard to the vexed questions with which they deal. Inadequate as they are, it cannot be pretended that this end has, even approximately, been attained. But, in its small measure, it is hoped that this paper may have contributed towards its fulfilment.

T. BATY.

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ERRATA IN MAY NUMBER.

P. 313, note 1. *For* [c. *iiii.*], *read* [c. *iiii*].

P. 333, notes 2 & 4. *For* 342, *read* 3285.

P. 333, note 3. *For* 342, *read* 3429.

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#### IV.—SOME OBSERVATIONS ON THE BANKRUPTCY LAWS.

**I**N a little book<sup>1</sup> recently published, a solicitor plaintively tells of the wiles practised by unscrupulous persons in obtaining goods on credit, and the difficulties that beset creditors when they seek to recover what is due to them. The author, who has evidently had a good deal of experience, seems to think that, seeing how hard it is to squeeze blood out of a stone, some Act should be passed making it a criminal offence for anyone to incur a debt without reasonable expectation of being able to pay it when called upon (the burden of proving such expectation being upon the debtor), and allotting severe punishment to the culprit on his conviction.

Considering the rush of competition in the present day, the necessary freedom of contract, the power which every one has of seeing after his own interests, and the somewhat

<sup>1</sup> *How to Avoid Payment of Debt.* By a Solicitor. London: Simpkin, Marshall, Hamilton, Kent & Co. 1901.

reckless facilities that many traders afford to easily tempted customers to buy things they do not want, it is probable that the aspirations of the author will be relegated to the limbo of dreams never to be fulfilled. But the suggestions made, lead to an enquiry into a much larger subject ; namely, whether the existing Bankruptcy Acts are all that can be desired.

Let us consider for a minute the history of the Bankruptcy Laws. These laws were not, as the Inspector-General in his report in 1885, somewhat inaccurately stated, originally introduced for the purpose of providing " for the relief of insolvent debtors who were unable otherwise to arrange their affairs," but they were introduced for the purpose of punishing bankrupts. The Act of Henry VIII. was entitled "an Act against such persons as do make bankrupt," The Act of Elizabeth states in the preamble, that, notwithstanding the Act of Henry against bankrupts, "those kinds of persons have and do still increase into great and excessive numbers and are like more to do if some better provision be not made for the repression of them." The first Act of James I. was passed "for the better relief of the creditors against such as shall become bankrupts," and the second (21 Jac. I., c. 19) was made for the same purpose, and also for inflicting corporeal punishment upon the bankrupts in special cases. These facts sufficiently show that the Acts were not passed for the relief of insolvent debtors, and also that bankruptcies were increasing. In the last-mentioned Act it was laid down that these laws were to be "in all things largely and beneficially expounded for the aid, help, and relief of the creditors," and a bankrupt fraudulently concealing his goods or unable to render a just reason why he became bankrupt was to be indicted, and, if found guilty, "shall be set in the pillory in some publick place for the space of two hours, and have one of his or her ears nailed to the pillory,

and cut off." It is to be remembered, too, that all his assets were realised for the benefit of creditors, and that there was no provision at this time for his discharge; so that whatever he might afterwards acquire was equally, with his existing estate, liable to be utilised for his debts.

One would have thought that, if legislation could make people moral, these statutes would have had that effect. But when we come to the reign of Anne we find (4 & 5 Anne, c. 17) that "many persons have, and do daily, become bankrupt not so much by reason of losses and unavoidable misfortunes as to the intent to defraud and hinder their creditors of their just debts and duties to them owing." It appears to have been then discovered that it would be as well to coax bankrupts to be honest as to frighten them. While, on the one hand, a bankrupt not surrendering and delivering up all his estate and effects was on conviction to suffer as a felon without the benefit of clergy, he was, on the other, under this Act, if he conformed, to be allowed £5 per cent. out of his estate, not exceeding in the whole £200, provided that such estate produced a dividend of 8s. in the pound, and he was entitled to be discharged from all his debts. If a man had lost £5 in one day or £100 in one year by gambling, he was not to have his discharge.

By the statute 5 George I., c. 24, the bankrupt who surrendered was for the first time protected from arrest in going to, staying with, or coming from the commissioners, in obedience to their summons, and by a statute passed in the succeeding reign, this protection was made continuous for forty-two days after his surrender.

I have thus endeavoured to show that in the earlier laws severity was tried (if putting a man in the pillory, cutting off his ear, or hanging him may be called severity), and that notwithstanding these enactments, bankruptcies grew and flourished, until at last it was deemed wise to bribe the dis-

honest trader to become good. Not for his relief, but in the interests of the creditors, the discharge, the allowance, and the protection were dangled before his eyes.

We may, I think, pass over the laws which were in force from the time of George II. up to the year 1869, accepting the statement of Sir Robert Collier, the Attorney-General, when he introduced the Bill of that year, as accurate. He described the oscillations of the statutory pendulum in relation to Bankruptcy Law. Sixty years before, Lord Eldon had said that in a number of cases under the then law its provisions were little more than stock-in-trade for Commissioners, Assignees, and other officials. The law existing in 1869 was as bad, and had been spoken of in terms of condemnation by the highest legal authorities and the most eminent commercial men. In later times a reaction had occurred, too much in favour of the bankrupt, and, judging from the recent Bankruptcy Laws, their object seemed to have been to protect the bankrupt against the creditors, to enable him to get rid of his debts and liabilities, with the least possible trouble or annoyance to himself, and to facilitate him in defrauding those to whom he was indebted, and in setting them at defiance. Sir R. Collier described or adverted to the scandals which existed under the system then existing owing to officialism, and the negligence and delay which existed in dealing with estates. Creditors were afraid of driving, or even allowing their debtors to go into Bankruptcy. It had become necessary, he said, to inaugurate a new system. There had been lengthened enquiries held, and suggestions made, and it seemed to have been agreed that the sole and proper object of a good Bankruptcy Law was, not to punish the debtor, but to collect the estate of a bankrupt, and to distribute the outcome as fairly, cheaply, and speedily as possible. It was not suggested that bankrupts might not be guilty of special offences in relation to their bankrupt-

cies. These had been summarised, and due provision had been made for their punishment in another Act—The Debtors Act, 1869—introduced at the same time, under which the trial for such offences would be relegated to the ordinary tribunals. The Bankruptcy Courts were only to have administrative functions and such judicial powers as were required for the carrying out of the objects of the Bankruptcy Law, pure and simple. The proper persons to look after the getting in and division of the estates of bankrupts were those who had the power of setting the law in motion and who were to receive the dividends. Let the creditors in defence of their own interests administer the estate through their own chosen representative, and apply to the Courts for assistance when it was necessary.

Such was the substance of the remarks of the Attorney-General on the principles of the Act. Under the Act itself, as it was eventually passed, creditors might petition for adjudication in bankruptcy against their debtors, while debtors were allowed to ask for liquidation of their estates or the settlement of a composition with their creditors. Under either course the creditors were to be the controlling powers. They were to meet and decide in their own interests what ought to be done. They could accept a composition if they thought fit. They could send the estate either into liquidation or bankruptcy, and appoint a trustee of the estate with or without a committee of inspection to supervise his conduct. They could give the debtor his discharge if the estate went into liquidation, and they could help him to get an order of discharge from the Court in case of bankruptcy.

The principles and main details of the Act were right, but unfortunately there were directions in it which essentially weakened its operation. One was a clause authorising every Judge in Bankruptcy to delegate his

powers to his registrar. No doubt this was inserted in consequence of a desire not to impose too much work on the Judge himself. The result was not satisfactory. The Judge is supposed to be appointed because of his capacity and fitness for the post. His Registrar in a County Court is, as a rule, an eminently respectable solicitor in the place who has not necessarily any judicial capacity at all. Cases of considerable importance were often heard and decided by these gentlemen and appeals multiplied accordingly, considerably increasing the expense of litigation. There was general distrust as to the correctness of the decisions in the courts of first instance.

Another error which eventually brought no small amount of scandal on the administration of the law was this: creditors being in many instances men engaged in active business felt that they could not or would not find the time to attend meetings in person. The Act allowed them to appoint proxies. Had such proxies always been their own clerks, to whom instructions could have been given how they were to vote, no great harm would have been done; but the powers were large and general. In a very little time it was seen that advantage could be taken of this. Individuals, often in the interests of the debtors, waited on the creditors, obtained their proofs, and got themselves appointed proxies, and thus secured majorities in voting, made themselves or their friends trustees, appointed their own committees of inspection in bankruptcy or liquidation, and gave the debtors their discharges, or if a composition was proposed, accepted some ridiculous sum.

The Registrars, before whom the cases came for approval, had not the strength to disapprove. The consequences were that the business of getting proxies fell into disreputable hands, and trustees, utterly unfit for their posts, and often only looked after by their own associates, played ducks and drakes with the estates. Now, it cannot be

denied that the creditors themselves were principally to blame for their supineness. They had the power of looking after their own interests, and they chose to delegate their power to others. When the mischief was discovered one would have thought that a remedy could easily have been found. An amending Act might have modified or excised the power of delegating judicial authority. The liquidation and composition sections might have been made to work without injustice; and the appointment of proxies might have been confined to the nomination of employes of the creditors. The supervision of trustees might have been strengthened, and the possibilities of misappropriation by these gentlemen considerably diminished.

Still, with all its faults the Act lived for fourteen years, and if towards the end of its existence it had lost some of its popularity with creditors, they had no one to blame but themselves. The number of bankruptcies, liquidations, and compositions were, comparatively speaking, at a low ebb at that time; but as shown by the Comptrollers-General's report in 1884 these amounted to 8,555. They were made up thus: Adjudications in London 346, in the County Courts 700; liquidations in London 614, in the County Courts 3,957; and compositions in London 657, in the County Courts 2,281; so that in London alone there were 1,617 proceedings in that year. In 1883 it was decided that a new Bankruptcy Act should be brought in, with the sanction of the highest legal authorities and the most eminent commercial men.

It will be remembered that the Act of 1869 was introduced and carried with the like sanction and approval, and one would expect to find a general assent by the promoters of the later Act to the lines laid down by the godfathers of the former, but such expectation would be doomed to disappointment. Of course, it was stated that the main object of a good Bankruptcy Law was the honest administration of

bankrupt estates with a view to the fair and speedy distribution of assets\* and, equally of course, the general doctrines of the old laws were adopted. With these exceptions the former Act was ignored. New methods were to come into force and new principles were enunciated. Creditors, it was said, had neglected their opportunities under the old Act. They were now as far as possible to be put into the corner. It was alleged that a great mistake had been made, and that contrary to all good and sound policy and principle, the creditors had been invited to undertake a public duty at their private charge. It seems to have been forgotten that as a fact they had never been invited to perform any public duty and that no public duty had been even suggested as requiring to be performed by any one in particular. They had been instructed that all they had to do was, if they thought fit, to look after their own private interests. It seems also to have been forgotten that the main expenses of the new arrangement was to fall on the creditors. These were small matters.

At any rate, it appeared that the Government had discovered, somewhat late in the day, that there was a public duty to be performed by someone and it was decided that some organisation should be found to do it. That public duty was the enforcement of "Public Morality" on the minds of bankrupts. Public interests had been ignored. There was no sufficient provision for the impartial and independent examination into the causes of bankruptcy and the conduct of the bankrupt. Henceforth all this should be rectified and adequate provisions for the punishment not of those who offended against public morality but of those who so offended and became bankrupts, and were thus found out, were to be provided. How was this to be done? It was true that officialism, as it existed under the Acts of 1849 and 1861 had been condemned. It was now to be revised, purged of its former iniquities. A new



order of well-informed, independent, and impartial officers to be called Official Receivers was to be called into existence. These gentlemen, under the directions of the Board of Trade, would investigate closely all matters connected with the bankruptcies under their charge, they would have large controlling powers in all cases, and in a great many instances they would have the actual administration of the estates, subject to the direction of the Board of Trade. The Act specified the offences against Public Morality to which attention was specially to be paid. They comprised offences under the Debtor's Act, and a number of other matters, beginning with not keeping proper books, and ending with breaches of trust, all duly set out in the 28th section of the Act. The offences under the Debtor's Act could be treated in the Criminal Courts, but in addition they were deemed to be bars to any discharge of a debtor. With regard to the other matters no other punishment was allotted to them except that, if any of these were proved against a man on his application for discharge, it was left to the Court to refuse the application, or to suspend the operation of any order, or annex conditions to it.

Such in short was the Act of 1883. Some members of Parliament raised their voices against the revival of officialism and the censorial powers to be given to the Board of Trade, and Sir John Lubbock said that he was afraid that they would have history repeating itself, and that before another twenty years were over they would be very glad to get rid of the system which the bill in question proposed to introduce. Nevertheless the Act was passed and in due course a large number of Official Receivers and other officers of the Board of Trade were appointed, at a considerable annual charge, in the interests of Public Morality, and especially to check those breaches of it which the Criminal law was

unable to touch. We may admit that Public Morality is a phrase to conjure with, and that if it really could be possible to make a nation virtuous by Act of Parliament no one would be likely to find fault with the expense reasonably incurred. Unfortunately the experience derived from some centuries of legislation teaches us that such a result is not to be obtained by such means. We have seen in relation to bankruptcies that in the earlier days, though a man remained continuously liable to arrest from his debts, and dishonesty on his part might be punished with the pillory, and the loss of his ear, or even by death itself, it did not conduce towards an improved moral tone. "*Tot volumina legis*" was answered by "*Crescit in orbe dolus.*" The main results of many statutes has been that people have evolved devices for evading them.

Since 1883 two enactments have been passed to which reference should be made. The first is the Deeds of Arrangement Act, 1887. The second the Amending Bankruptcy Act, 1890.

The Act of 1883 was never a popular Act. As a rule creditors did not like it. Neither did debtors, nor solicitors, nor accountants. The dictatorial manners of many of the first officials had much to do with this, but, apart from this objection, it was felt by all the other parties interested that they could often do much better for themselves than the somewhat hard and fast limitations of a Bankruptcy Court and an Official Receiver could do for them. The contracting of the debts had been private, and there was no reason why the solution of those debts should not be private too.

As for public morality, any ordinary creditor would prefer five shillings, or even three-and-fourpence in the pound paid quietly and without any fuss to a dividend of one-and-eightpence coupled with the glorification of a public principle. So private arrangements with creditors grew. It was clear that in some instances it would be better for

all concerned that any creditor who was disposed to stand out and be troublesome should be settled with on his own terms, and, if the other creditors chose to assent to this or authorise a trustee to negotiate with the opposing party, there could be no objection. These things could not be managed under the Act, or, if managed, not without expense, publicity, and delay. Therefore, as I have said, private arrangements grew, and with this result: Publicity was not the only thing which was avoided. Fees which in bankruptcy cases would have flowed into the Bankruptcy Estates Account were not paid. For this and other reasons it was deemed wise to pass the Deeds of Arrangement Act, 1887, to enforce publicity by means of registration of all such deeds. Of course, fees were to be paid on registration. It is needless to say that in many cases the Act has been evaded. If a debtor induces a friend to go round to the creditors and buy up their debts for much less than the face value, and afterwards settles with that friend, there is nothing to register. There are other ways of avoiding the necessity for registration.

The main feature of the Bankruptcy Act, 1890, is the limitation of the power of Judges to grant a bankrupt his discharge. It seems that Judges, being human, and not mere atoms of a Government department, used too much discretion when applications for discharge were made. They looked at the case all round, and, if they thought that the offence was a slight one, or that more good would be done by granting an immediate discharge, or only with a short suspension, they decided accordingly. It is easily to be understood how terribly wrong this must have appeared to the official mind. A remedy was found by this Act, under the 8th section of which when any of the offences against public morality not being crimes are proved against a bankrupt, the judge is forced, whether he thinks it right or not, to refuse the discharge or suspend it for two years, or until a

dividend of not less than 10s. has been paid, or make the bankrupt assent to judgment to be enforced against his future earnings for the whole or a part of his unpaid debts, which in nine cases out of ten is a farcical proceeding.

Let us see how this law has worked. It has, as I have said, never been popular. In the year 1883, under the old law, there were 8,555 proceedings commenced, as I have before stated. In 1899, according to the Inspector-General's Report, the total number of Receiving Orders made all over the country were only 4,083, less than half the record of 1883. There were deeds of arrangement registered 2,974. Out of the 4,083 Receiving Orders only 37 approvals of composition and one of a scheme of arrangement were given. 2,893 adjudications were made on debtor's own petition and 3,392 out of the 4,045 (4,083 - 38) were dealt with as small estates. Bearing in mind that the population and trade of the country has increased, we can form some estimate of the favour with which the Bankruptcy Law and its officials are regarded by the public.

Can we put the reduction in business to a corresponding improvement in public morality? Hardly. If we were to add to the registered deeds of arrangement, the number of failures that are settled without there being anything to register, we should probably find but little difference in the failures recorded in 1883 and those which take place in one form or another in the present day.

In the opinion of the writer, a creditor now rarely petitions against a debtor unless actuated by personal spite and a desire to make things as unpleasant as possible. The vast majority of debtors' petitions are filed in the country, and are put on when there are but small assets.

The punishments of the Act are confined to those persons only who apply for discharges. They appear to be about one-fifth of those who have been adjudicated bankrupts, so

that we may take it that the remaining four-fifths do not care whether they get discharged or not. It is true that an undischarged bankrupt, obtaining credit to the extent of £20 or upwards from any person without informing such person that he is an undischarged bankrupt, is liable to be indicted for misdemeanour; but most bankrupts in these days are quite equal to the occasion. Most of them have a wife or friend or relation in whose name, and nominally in whose behalf, they can continue to trade. They do not pledge their own credit, but the persons with whom they deal are quite satisfied that they will get paid, and trust accordingly. The banking account, if there is any, is in the name of the nominee, whether wife or otherwise, and the bankrupt signs cheques, "p.p.," or under an authority previously given. In the hurry of commercial life creditors soon get tired of looking after a debtor who does not pay. Even the Official Receivers and the Board of Trade find the business of the current day sufficient for them, and unless the man comes notoriously into a legacy on his own account, a thing which testators usually take care shall not be the case, the whole matter passes into oblivion.

The writer has no intention of finding fault with Official Receivers. They may be taken to be high-minded and honourable men, a little, perhaps, at times puffed up with a sense of their own importance, but not more so than might be naturally expected. The fault is in the system which has crystallised them into, too often, mere representatives of red-tapeism, and has fixed upon their minds the idea that everything which in anyway runs counter to the Bankruptcy Act must necessarily be opposed to public morality; that a creditor commits a moral fraud if he does not insist on his debtor's estate being wound up in the Bankruptcy Court, and express his willingness to receive only a proportionate dividend out of such portion of

the debtor's estate as may be left after the same has been sold, often at a disadvantage, and has been reduced by the mulct necessary to keep the officers of public morality in their places ; and that a debtor also commits a moral fraud if he does not voluntarily submit to the annoyance of all the bankruptcy processes, and does not permit himself to be punished by two years' suspension of his discharge if his estate does not realise ten shillings in the pound.

There are several ways of placing the question on a proper footing, but I will only deal with two which appear to be most consonant with existing feelings. Either let us revert to the old Act of 1869 modifying the powers of delegation of judicial functions as before referred to, and confining the proxies to those who can really represent the creditors, altering too, if need be, the majorities by which resolutions can be carried, and giving to Judges greater facilities and powers of examining into the reasonableness of the proposals to be put before them ; or let the existing Acts be altered and made far more elastic than they are at present. Let the powers of the Official Receiver be reduced, and the semi-judicial position that they at present occupy be taken away from them.

It is impossible in the limited space at the writer's disposal to do more than indicate very shortly the details of the proposed modifications in three or four of the more important proceedings.

The first great step in any bankruptcy, after the Court has made a receiving order, is the holding of the first meeting of creditors, who are then supposed to decide whether they will accept a composition or scheme if offered by the debtor, or direct that the estate shall be administered in bankruptcy. In the latter case they can nominate a trustee unless they wish to leave the matter in the hands of the Official Receiver.

The decision upon these points is essentially a matter for

the creditors alone. No interference with their discretion by anyone, Official Receiver or otherwise, ought to be allowed. Every creditor has a moral right to expect that no one shall be allowed to vote in competition with himself except such as stand in the same relation to the debtor as he does. It is a breach of Public Morality to allow the Official Receiver, who knows nothing about the matter except what the debtor may have told him, to out vote by his general proxies the real creditors. If proxies are to be allowed they should be rigidly confined to the employes of the creditors. The name of the Official Receiver which is now printed in the proxy papers, should be struck out. It savours too much of the system of touting for proxies which was one of the banes of the old régime.

The official receiver might be allowed to act as Chairman at the first meeting, receiving proofs, adjudicating, *pro tem.*, on the validity of proxies, and putting such resolutions as are proposed and seconded, but he should not, under any circumstances, be allowed to vote as the representative of any creditor or creditors, or on his own behalf. The question as to whether a resolution for composition or arrangement has been duly passed should go before the judge. He would decide on the validity of any proofs or proxies which had been objected to, would hear objections to the approval of the resolutions made on behalf of any of the parties interested, in which category the Official Receiver would have no place, and if in his absolute discretion he should consider that a public examination of the debtor should be held before giving his decision on the resolutions, he should have power to order it, and give directions as to which one or more of the objecting creditors should conduct it. Otherwise he should have power to approve the resolutions without any public examination at all being held.

If the creditors should resolve on the estate being wound up in bankruptcy, they could nominate a trustee and committee of inspection, in which case the Official Receiver should be ousted from any further interference, or they might be allowed to appoint the Official Receiver as Trustee with a committee of inspection, or they might leave the matter in the hands of the Official Receiver and the Board of Trade.

A public examination should be held in every bankruptcy court before the judge, the trustee, whoever he might be, and the creditors being the only persons who should be allowed to appear or be represented.

The only persons who should be allowed to apply to the Court in relation to discovery or the getting in, realising or distributing the estate should be the parties immediately interested, including the trustee.

As to the applications for discharges, the trustee alone should have power to make a report to the Court, but any creditor might lodge his objections, and upon hearing all that might be alleged and proved the judge should have the largest powers of granting, refusing, or suspending the order. In every case the right of appealing should be allowed.

No reference has been made here to some questions of general bankruptcy law which many would be glad to see altered, but the writer may be permitted to suggest that the doctrine of reputed ownership under which the goods of people other than the bankrupt are made subject to his debts is in these days little more than a relic of deficient civilisation. Later Acts have considerably whittled down this doctrine, and it is submitted that no harm would be done if it was put an end to altogether.

E. COOPER WILLIS.



## V.—THE MONEY-LENDERS' ACT, 1900.

**B**EFORE considering the scope of this statute and its effect upon money-lending transactions it may be desirable to give some brief account of the origin and history of usury and of the equitable doctrine upon which the present measure is so largely based.

In every society of which we have reliable records we find that usury has had precisely the same origin and has followed precisely the same course of development.

In primitive communities, whether in the family or tribal state, it was considered unfair and improper to stipulate for, or even expect a reward for, the loan of labour, or goods from a kinsman or a fellow-clansman.

A curious survival of the gratuitous loan of labour is found in the *pomoch* (help) of the Russian Mir. By this custom any householder of the Mir may invite his neighbour to assist him in any unusually heavy piece of work, such as the rebuilding of his house or the erection of farm buildings. The only immediate return consists of different kinds of refreshment offered to the guest-workers and this is purely complimentary. No one, indeed, is compelled to obey the summons, but on the other hand any one who has previously been benefited by the *pomoch* is bound in honour to attend.

So too in Kabylia, the loan of labour called *touiza* is purely gratuitous but it is a point of honour to repay the equivalent.

In the early British village communities labour was also a subject of gratuitous loan. So too were loans of boats, horses and ploughs and doubtless other primitive instruments of production, and cattle.

The first stage then, in the history of usury, is the gratuitous loan of labour or chattels, coupled with the expectation on the part of the lender of receiving back

some day a loan of a similar character, but not of an increased value, and without the slightest idea of any profit. And such return was expected to be made, not necessarily by the borrower, but by his family or tribe.

The second stage is reached when the lender expects to get back the loan with any natural increase which would have accrued if he had retained the chattel in his own hands. In primitive agricultural communities the capitalist was the man who had cattle to lend in the breeding season, or corn to spare at the time of sowing.

In Babylonia, Egypt and China alike, as elsewhere, the customary rate of interest was 33 $\frac{1}{3}$  per cent., and when this interest had been paid for three years the transaction came to an end. The explanation of this custom has been admirably stated by Miss Edith Simcox in the following passage :

“Among the primitive progressive people who cultivated the wild wheat of Babylonia, we may feel sure that the primitive instincts of hospitality never sank so low as for one man to ask another to give him back with increase the corn borrowed and eaten in a day of need. But the case is quite different as regards corn to be used, not for food, but seed capable of bringing forth one hundred-fold. At such a time to lend a measure of corn is to give up the near and certain prospect of its natural increase, and the owner, without churlishness, may stipulate for a share in the increment of value contributed by earth and heaven. If one man gives the seed and another the labour, and the sun and the river an abundant harvest, a third part of the whole crop might not unnaturally seem a fair share for each of the partners in the adventure, while in three years the heaven-sent residue would pay off the loan.”

A curious confirmation of this theory is found nearer home, in Ireland, under the Brehon laws. The principal

capital of the Irish chieftains consisted of cattle, which they loaned out to their tribesmen, under a custom known as "giving stock" one-third, or 33 $\frac{1}{3}$  per cent. being returned annually. In all these cases, however, there was no idea of usury in the proper sense of the term, although it formed the germ. The feeling that it was improper to charge a kinsman or fellow-clansman with interest, long survived the tribal stage of society. Even when inter-tribal commercial relations had been established, this feeling remained for centuries embedded in the popular mind. For instance, the Jews were thus enjoined in Exodus xxii. 25, "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent: unto the stranger thou mayst lend upon usury." So too a Roman citizen was forbidden to lend at interest to a Roman citizen, although he might enter into money-lending transactions with a Latin or an ally without regard to the rate of interest. In the Middle Ages also a Christian was liable to heavy penalties if he lent money or property to a fellow Christian for reward.

Among the followers of Mahommed usury is absolutely forbidden, and consequently in Turkey we find money-lending in the hands of Greeks and Armenians. In India it was also illegal for the two superior castes of Hindoos—the Brahmins and the Kshattriyas—to engage in such transactions, and even in the case of the two lower classes the Code declared "that the sum lent to a person in distress can give rise to no interest, because then such interest would be extortionate."

Thus usury was at first only tolerated when one of the parties to the transaction was a foreigner, the old feeling of unfairness or impropriety by reason of blood relationship not existing. Indeed, the connection was exactly the reverse. A foreigner was to be treated as an enemy, one to be killed, enslaved, plundered or cheated, as the case

might be. To spoil the Egyptian was a virtue. So money-lending as a business in Palestine fell into the hands of the Gentiles, such as the Phœnicians, in Rome of the aliens, and in mediæval Europe of the Jews.

From the legal recognition of usury between a citizen and an alien to that between citizens was but a short step, but the idea that a bargain for high interest in perpetuity was taking advantage of the borrowers' necessities, survived and forms the root principle of the Money Lenders' Act, 1900. To protect the borrower from extortion, the rate of interest was limited by the legislature. But from the time of the Twelve Tables in Rome to the abolition of the usury statutes in England such legislation has been wholly ineffective. Legislative restraints of legitimate transactions are always and everywhere doomed to failure, and the English Usury Laws have been no more successful in preventing, or even in restricting, usury than the Roman enactments of earlier date.

Much of our Common Law, as is now recognised, was reduced from the rude mass of mere custom into an articulate system by the "Popish clergymen" in the service of the Crown, and usury was declared unlawful at Common Law. Doubtless, it had been forbidden before the Conquest in most of the Saxon communities, but the Church was well aware of the popular idea upon this subject, and, whether or not the clergy were responsible for the Common Law prohibition, they were quick to invest the primitive and popular prejudice with a religious sanction.

But in spite of religious and legal sanctions money-lending grew apace. Means of evading every prohibition were always forthcoming, until at length the statute 37 Hen VIII, c. 9, after repealing all prior statutes, whilst declaring usury to be "a thing unlawful,"—a declaration intended no doubt to appease the tender conscience of the Lords

**Spiritual**—legalised the practice by fixing the maximum rate of interest on all commercial and real transactions at 10 per cent.

This rate was subsequently reduced to 8 per cent. by 21 Jac. I., c. 17; to 6 per cent. by 12 Car. II., c. 13; and finally to 5 per cent. by 12 Ann. stat. 2, c. 16, at which figure it stood at the repeal of the Usury Laws in 1854.

Contemporaneously with these laws against usury, Courts of Equity in certain cases granted relief where borrowers had been subjected to oppression, extortion or unfair treatment. It was suggested in the case of *Benyon v. Cook* (1874), L.R. 10 Ch. 391, that with the repeal of the Usury Laws, this equitable jurisdiction no longer existed, but Jessel, M.R., made it abundantly clear that the repeal had no such effect whatever. From the earliest days of the Court of Chancery, suitors had been successful in obtaining relief in the case of transactions, which would not have been considered fraudulent at Common Law. It was not enough at Common Law that fraud, in the sense of misrepresentation, and taking undue advantage of the position of the party said to be imposed upon had been committed, but some act of "offensive dishonesty" must have been brought home to the party charged.

In a few isolated cases the equitable doctrine, however, has also been applied at Common Law. In *assumpsit* to pay for a horse a barley-corn per nail, doubling for every nail in its shoes, it was averred in the declaration that there were thirty-two nails in every shoe, which, doubling for every nail, came to 500 quarters of barley; and Hyde, C. J., directed the jury to give the value of the horse only in damages and £8 being given, judgment for that amount was had, since a catching bargain was not to be taken advantage of (*James v. Morgan* 1 Lev. iii., 16, cited in *Thornborough v. Whitacre*, 2 Ld. Ray, 1164).

In an action for goods sold and delivered at three months'

credit, and in case of default, interest on the principal above the legal rate, the contract was held to be a *bonâ-fide* sale and not usurious. But otherwise if it had been merely colourable to cover a loan and evade the Statute. (*Floyer v. Edwards* (1774) Cowp. 112.)

This was followed by an action for money had and received to recover the additional interest in such transactions. Lord Mansfield held that though the transaction did not itself amount to usury, yet it was a hard and unconscionable advantage and therefore should not be assisted in an action for money had and received, which is an equitable action founded in conscience under the particular circumstances of each case. (*Plumbe v. Carter*, (1775) Cowp. 116).

In another action for money had and received, the borrower had agreed to purchase with the money lent certain goods, and upon a resale to divide the profits with the lender. The bargain was held to be unconscionable, and Lord Mansfield, in his judgment, declared "that the intention of the contract was to get more than principal and legal interest upon the note which is usury within the meaning of the statute. But suppose it was not strictly usurious, shall a man in action for *money had and received* which is an equitable action and founded in conscience recover such an unmeasurable and exorbitant demand as this? Most clearly he shall not." (*Jestons v. Brooke* (1778). Cowp. 793).

Equity on the other hand, as distinguished from Common Law, in dealing with fraud, appeals to, and acts on the conscience of the parties and demands not only a formal compliance with the rules of honesty but a conscientious consideration of the interest of other people. It will take into consideration all the circumstances of the case, not only the act and intention of the party complained of but the position of the party said to be imposed upon. It will

interfere not only when actual deception has been practised but also to prevent the dishonest circumvention of one person by another.

So it came to pass that these general principles were more particularly applied by Courts of Equity in favour of a small class of persons, a result largely due, no doubt, to that tender regard for the rights of the landed interests characteristic of the times. Although these principles had been applied centuries before 1750, Lord Hardwicke in the leading case of *Chesterfield v. Fanssen*, decided in that year, was the first to fully lay down the equitable doctrine of unconscionable bargains.

After enumerating the different species of fraud which sufficed to induce the interference of Courts of Equity, he said "The last head of fraud on which there has been relief is that which infects bargains with heirs, reversioners or expectants, in the life of their fathers, &c., against which relief is always extended. These have generally been mixed, compounded of all or several species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting, weakness on the one side, usury on the other, or extortion, or advantage, taken of that weakness. There has been always an appearance of fraud from the nature of the bargain. . . . In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor or relative, from whom there was expectation of the estate, has been kept in the dark ; the heir or expectant has been kept from disclosing his circumstances and resorting to them for advice, which might have tended to his relief, and also reformation ; this leads the ancestor to leave his estate not to his heir or family but to a set of artful persons who have divided the spoil beforehand."

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Prior to the Sales of Reversions Act 1867 *bonâ-fide* transactions by expectants dealing with their reversionary interests might be opened and set aside for mere inadequacy of price. Since the Act, however, no purchase made *bonâ-fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate can now be opened or set aside merely on the ground of under-value, *unless in deed such under-value is so gross as to be of itself clear evidence of fraud*. Before this Act the *onus* of proving that the transaction was just and reasonable was upon the purchaser, now it lies upon the vendor to show want of *bonâ-fides* or the existence of fraud, or unfair dealing on the part of the purchaser, and unless he shows this the transaction will stand, notwithstanding inadequacy of price. If, however, the inadequacy is so gross that the presumption of fraud arises the *onus* of repelling, such presumption is thrown upon the purchaser, and he must show that the transaction was fair, just, and reasonable.

*Persons entitled to relief*      1. *Heirs, Reversioners and Expectants.*

This class was defined by Sir George Jessel in *Benyon v. Cook* (L.R. 10 Ch. App. 391), where he said the phrase "expectants or expectant heirs" was used in the popular sense.

2. *Persons other than Heirs, Reversioners or Expectants.*

Whether the narrower doctrine of unconscionable bargains relating to heirs, reversioners, or expectants, grew out of the wider doctrine applicable to all persons, or whether the latter was developed from the former, one undoubted effect of the repeal of the Usury Laws was to bring these principles into operation to a greater extent. It seems clear from the cases both before and since the repeal that the doctrine has never been limited to the small class mentioned.



In *Neville v. Snelling* (1880), L. R. 15, Ch. D., 679, Denman, J., declared that he could find no case which decided that the interference of the Court is limited to cases in which the dealings were with expectant heirs or reversioners, or to cases in which the dealings have been in relation to an expectancy, and that he gathered from the expressions used in several of the cases that if the transactions are such as to show that the money-lender has throughout been unconscientiously trading upon the weakness of the borrower, commencing operations with him during his minority, charging him with usurious interest, and endeavouring to entangle him more and more in indebtedness, not as a fair matter of business, but looking to the chances of extorting money from others interested in the debtor, especially if there be any unfair dealing in the course of the transactions which are before the Court, the Court will, so far, restrain the transaction as to compel the money-lender to be satisfied with the sum advanced and fair interest.

And, the learned Judge added, the real question in every case seemed to him to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established, that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising money.

"Sometimes extreme old age has been unduly taken advantage of and the transactions set aside. Sometimes great distress, sometimes infancy has been imposed upon, and transactions, though ratified at full age, have been set aside because of the original vice with which they were tainted. In every case the Court has to look at all the circumstances. In some cases may result the conclusion that there exists mere inadequacy of price or exorbitancy of interest charged, in which case the transactions will not

be interfered with. But in others taking the whole history together it may present so many features of unconscientiousness, extortion, and unfair dealing on the one side, and weakness on the other, as to compel the Court to exercise its equitable jurisdiction, at all events so far as to restrain the profits of the money-lender within fair and reasonable bounds."

And in conclusion his lordship said: "Nor do I entertain any doubt that upon the general principles of equity, which lay it down that unfair and unconscionable dealings with a person whose position renders him too weak to resist rapacity and avarice, and unfair dealing, are within the jurisdiction of the Court, and ought to be repressed."

It must be observed that the borrower was not strictly an expectant heir, but merely the son of a rich father, with general expectations only. Even so, however, he falls within Sir George Jessel's definition.

*Fry v. Lane* (1888) L.R. 40 Ch. D. 312, although a case of the sale of a reversion, is invaluable for the present purpose. After reviewing numerous cases where the sales were of property in possession, Kay, J., said "The result of the decisions is that when a purchase is made from a poor and ignorant man, at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession, and *à fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor and absence of independent advice throw upon the purchaser, when the transaction is impeached, the onus of proving in Lord Selborne's words that the purchase was 'fair, just, and reasonable.'"

These principles were adopted in *James v. Carr* (1888) 40 Ch. D. 449, and in *Rees v. De Bernardy* L. R. [1896] 2 Ch. 437, in which latter case Romer, J., set aside the agreement as an improvident bargain.

Although by the Judicature Act, 1873, the equitable jurisdiction of the Court of Chancery became vested in all the judges of the High Court of Justice, the common law judges were very slow to avail themselves of its powers in this particular instance. With few exceptions they regarded a usurious transaction, however extortionate, in the absence of legal fraud, as a bargain which they were bound to enforce.

Asked whether under such circumstances the judges should have power to review these transactions, Lord Brampton (Mr. Justice Hawkins) replied "I think so, because if the judges found that it was a reasonable bargain—if they found that the men were competent to do their own work, that there was no pressure put upon either, that it was a voluntary thing that was done—I think the judges would all say :—‘ It is a bargain ; it is made, and we will not interfere with it.’ ”

“ But,” he added, “ there is often a good deal of pressure which renders a transaction, to my mind, very shady and suspicious ; pressure may be put on which does not actually amount to deception.”

Here Lord Brampton got very near to the root idea of the equitable doctrine which appears even now to be hardly ever appreciated by the common law judges and practitioners. This principle is clearly laid down by the Master of the Rolls in *Healey v. Cook*, 1873, Ir.R. 8 Eq. 570.

In this case the borrower was twenty-eight years of age, and an officer in the army who borrowed money upon his estates in possession at exorbitant rates of interest. The learned judge granted relief, not merely because the transactions were usurious, but because the reasons for impeaching them rested on a far wider and deeper foundation. *The parties were not upon equal terms.* Apart from other questions of fraud, the money lender was protected by legal knowledge and advice, the borrower was not, whilst

the latter was overreached by the former in a matter resting within his own peculiar knowledge.

In his evidence before the Select Committee, Lord Brampton stated that on a summons for judgment under Order XIV., when excessive interest was claimed, he would have given unconditional leave to defend. Such, however, was not the practice, and there is no reported case showing that where there was no evidence of legal fraud, unconditional leave to defend was given. In actions for money lent on bills and promissory notes in the absence of any evidence of legal fraud, judgment followed as a matter of course.

In spite of the Judicature Act, the Common Law Courts remained but the tools of the money-lenders. The same state of things as that described by Mr. Justice Byles in 1845 continued. "There will be found," he wrote, "in every Court of Common Law the most cruel actions constantly brought to enforce these extortionate demands; actions in which the law, so far from being as she ought, the hand-maid of justice, is in reality prostituted and made an accomplice in the perpetration of the most iniquitous gambling and robbery."

Curiously enough prior to the new Act, County Courts had no power to give effect to the equitable doctrine since they had only a limited equitable jurisdiction.

It is true that many County Court judges, horrified by the extortionate character of agreements which they were asked to enforce, exercised their discretionary powers under section 153 of the County Courts Act, 1888, and others on a judgment summons ordered payment by instalments so small as to render the judgments obtained of practically no value whatever.

What changes then in the law and practice relating to money-lending has the new statute created?

First by section 1 where any proceedings are taken in

any Court by a money-lender, as defined by the Act, for the recovery of any money lent or the enforcement of any agreement or security made or taken in respect of money lent and there is evidence which satisfies the Court,

(1) That the interest charged in respect of the sum actually lent is excessive, *or*

(2) That the amounts charged for expenses, inquiries, fines, bonus, premiums, renewals, or any other charges, are excessive, *and* that

(3) In either case the transaction is harsh and unconscionable, *or*

(4) Is otherwise such that a court of equity would give relief, the Court may reopen the whole transaction.

Secondly, by sub-section 2, in every case in which the money-lender is entitled to sue the borrower, surety or other person liable, these latter may take proceedings to obtain such relief as the Court would grant if such proceedings had been taken by the former, and these proceedings may be taken by the borrower, although the time for repayment of the loan or any instalment thereof has not arrived.

Perhaps the most important provision is the extension of the equitable doctrine to the County Court, but even here the extension is not as full as it should have been. The limits of £50 and of £100 for remitted actions are still applicable, but where the action is for specific performance of an agreement to give security, the money-lender must proceed in the High Court, since the County Court jurisdiction in such actions is limited to agreements for sale, purchase, or lease. The limit of £500 in equitable proceedings also remains the same.

Another important change is that it will no longer be safe for the borrower, whether he is a defendant or plaintiff, to merely pay into Court the amount actually advanced

together with 5 per cent. interest, since the Court is now enabled to allow the money-lender such interest exceeding this rate as it may deem reasonable. It will be observed that excessive interest or charges are not by themselves a defence to an action for money lent, but that the transaction must also be *cither* harsh and unconscionable *or* such as a Court of Equity would relieve.

This provision has already been the subject of judicial review in the case of *James Wilton and Co. v. Osborne* (17 T. L. R. 431), tried before Mr. Justice Ridley. The defendant had obtained a loan of £40, for which he had given a promissory note, which had been renewed 14 times, each renewal costing £6. Having already repaid £84 and being desirous of paying off the capital, the plaintiffs demanded a promissory note for £60, repayable in four instalments of £15 each, the whole to become payable immediately upon default of any one instalment. Eventually the defendant gave a promissory note for £56 upon similar terms. Default was made upon the first instalment, so that the whole became due, the interest working out at 160 per cent.

Upon these facts Mr. Justice Ridley found that the interest was excessive "and that the whole transaction was harsh and unconscionable in the sense that the charges made were excessive and extortionate." But the learned Judge, believing that a Court of Equity would not grant relief merely because the charges or interest were excessive, came to the conclusion that this was not a case in which a Court of Equity would interfere. A Court of Equity, he declared, "considers not improvidence, folly or imprudence, but unfairness, overreaching, and coercion. Here the defendant was not overreached, nor was advantage taken of his necessities. He exercised his own volition and he made terms."

The learned Judge also came to the conclusion that the

two requisites "harsh and unconscionable" and "otherwise such that a Court of Equity would give relief" are not alternatives, but that the latter clause only gives completeness to the definition of "harsh and unconscionable" bargains. A stay of execution was granted on the statement that the Irish Courts had taken a different view of the Act. There can be little doubt that it was the intention of the framers of the Act to make these provisions alternative, and that the second clause is exclusive of the first, and was intended to cover all cases in which a Court of Equity would grant relief, whilst the first clause was intended to include other cases in which hitherto it might not have given relief.

It appears to me that in drafting the first clause the framers of the Act had in their minds those cases decided at Common Law, where the excess of interest was the only evidence of extortion.

It cannot be denied, however, that some support is to be found for Mr. Justice Ridley's view in section 1 (7) of the Act, which enacts that in Scotland this section is to be read as if the latter clause were omitted. These words were not required, because in Scotland there is no special Court of Equity.

According to the learned judge the section is limited to "cases where the interest or charges are excessive, and where there has been conduct for which as harsh, unconscionable or unfair, a Court would give relief."

The result, therefore, is that you may have a transaction harsh and unconscionable, and yet one which a Court will not relieve. Thus a bargain, however extortionate, remains a bargain which the Courts will enforce. The evident intention of the framers of the Act was to give relief when under the peculiar circumstances of each particular case the interest was so extortionate as to amount to a harsh and unconscionable bargain.

Excessive interest alone, as Mr. Justice Ridley rightly says, has never been a ground by itself for relief. For instance, in many cases, as in "short loans," 500 per cent, may appear excessive, and yet not extortionate, or harsh, or unconscionable under the particular circumstances of a given case. On the other hand 60 per cent.—a usual rate in money-lending transactions—may be extortionate, when for some reason or another the parties were not upon equal terms.

The Irish case was an application for final judgment for £15 and interest, which the Chief Baron found worked out at 2,800 per cent. per annum. Relying upon the provisions of this section, which requires the combination of excessive interest and a transaction harsh and unconscionable, the Chief Baron gave judgment for the amount claimed and interest only at 5 per cent. The Chief Baron appears to have acted upon the principle that the rate of interest was so extortionate as to raise the presumption of fraud which the plaintiff failed to rebut by showing that the transaction was in fact, fair, just and reasonable.

The judgment of Mr. Justice Darling in the case of *Parker v. Tynte* reported in the *Times* of June 17th last shows that he takes exactly the opposite view to Mr. Justice Ridley in *Wilton v. Osborne*. The action was on a promissory note for £210 payable six months after date. The sum actually advanced was £150 with interest at 1s. in the £ per month. The contract was prior to the Act, which consequently did not apply. As the transaction was the result of a money-lending circular, which probably contained the statement that the money-lender advanced money "on easy terms," the case might have been successfully defended on the principle laid down by Vice-Chancellor Malins in *Helsham v. Barnett* (1873) 21 W. R. 309.

This point is now covered by the 4th section of the Act,



which enacts that any such misrepresentation shall amount to a misdemeanour punishable by "imprisonment with or without hard labour for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both."

The only case cited for the defence was *Chesterfield v. Janssen*, and the objection that equitable relief could only be given to an expectant heir was upheld. The most important point, however, was the declaration by Mr. Justice Darling that "if the case had happened so lately as to have come within the Act of last year he should certainly have held that the interest charged was excessive. In future, money-lenders would find that if the bargain was hard and unconscionable they would not get the money which in this case he would have to give judgment for. In this case he could not say that the plaintiff had taken advantage of the weakness of the defendant. The defendant might have been a weak man, but there was nothing to show that the plaintiff knew it, or that he had taken advantage of his weakness."

If further authorities had been cited the case might have gone differently.

It has been suggested that excessive interest should be defined. To my mind this would be a fatal mistake. Each case must rest upon its own peculiar circumstances. As I have stated, always and everywhere, the legal maximum rate of interest has been evaded.

"At the beginning of the 19th century," writes Mr. W. M. Harrison, "there was scarcely any country which allowed contracting parties to stipulate for more than a definite rate of interest. At the present day we find that to a very large extent no legal limits on the rate of interest are in existence, while on the other hand a new and wider conception of usury has been evolved which has found expression in the laws of several nations."

This conception, he says, means "no longer merely or necessarily at all the exceeding a rigid maximum rate of interest, but any transaction when one party was for some reason or another—because of inexperience, for example, or some other unbusinesslike characteristic—at a disadvantage in relation to the other, and that other took advantage of his position to secure excessive profits to himself. Usury for the purpose of the modern law is, speaking widely, exploitation resulting in an unconscionable bargain."

Whatever may be the true interpretation of this section, a simple solution of the difficulty lies in adopting the principle applied in the case of sales of reversions. Before the Sales of Reversions Act, 1867, mere inadequacy of price was a sufficient ground for relief, and the *onus* of proving the adequacy was thrown upon the purchaser. Since the Act the transaction if *bonâ-fide* and without fraud, or unfair dealing, stands on the same footing as a sale of an interest in possession and the *onus* of showing the want of *bonâ-fides*, or the existence of fraud, or unfair dealing on the part of the purchaser, is thrown upon the vendor.

If the vendor fails to show this, the transaction will stand good notwithstanding inadequacy of price. But when the inadequacy is so gross as to be extortionate, the presumption of fraud arises, and in the words of Lord Selborne in *Aylesford v. Morris* (L. R. 8 Ch. App. 484), "The transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact, fair, just and reasonable."

Following this analogy the Act might be amended by enacting that excessive interest or charges, etc., shall not by themselves constitute a ground for relief, but where they are so excessive as to be extortionate, a presumption of fraud shall arise, the *onus* of repelling which, shall lie upon the money-lender, who may do so, by showing in fact, that

under all the circumstances the transaction was fair, just and reasonable.

*Brenchley v. Higgins*, 1900 (82 L. T. Rep. 143) is a case of sale of a reversionary interest in which Mr. Justice Farwell held that the consideration appearing in the documents was so grossly inadequate as to cast the *onus* upon the money-lender of showing that there had been no unconscionable bargain. It is true that the borrower had no independent advice, but this fact does not appear to have influenced Mr. Justice Farwell's decision on the above point.

Upon appeal this decision was affirmed (83 L. T. Rep. 751). But as there were clear circumstances of fraud the Court declined to say whether the inadequacy alone would have been a sufficient ground for relief. From the language of Vaughan Williams and Romer, L., JJ. it seems clear that apart from the circumstances they were of opinion that where the price was so inadequate as to be extortionate, "under many circumstances gross inadequacy of price might in itself be sufficient to enable the Courts to conclude that the purchase was an unfair one as against the purchaser."

By section 2 (1) "A money-lender as defined by this Act (a) Shall register himself as a money-lender in accordance with regulations under this Act . . . . under his own or usual trade name and in no other name and with the address or all the addresses if more than one, at which he carries on his business of money-lending and (b) Shall carry on the money-lending business in his registered name, and in no other name, and under no other description, and at his registered address, or addresses, and at no other address or addresses; and (c) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money or take any security for money

in the course of his business as a money-lender otherwise than in his registered name; and

(d) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefore."

Sub-sections (a), (b) and (c) are the result of the decision in *Gordon v. Street* (L.R. [1899] 2 Q. B. 641). Here the plaintiff, the notorious money-lender, Isaac Gordon, concealed from the defendant his real name, and represented it to be Addison, and that Addison was a person who advanced money without any of the objectionable features of a professional money-lender, and thereby induced the defendant to borrow £100 at £50 per cent. interest. The defendant on discovering his real name, repudiated the transaction, and in an action by Gordon paid the sum advanced with interest at 5 per cent. into Court. The Court of Appeal, affirming the judgment of the Judge at the trial with a jury, held that the fraudulent concealment of identity was material, and gave judgment for the defendant. What is a man's own name is, says Mr. J. M. Lely, not always quite easy to determine. It would appear to mean the name under which he chooses to carry on his business.

Attempts have already been made to evade these provisions. A money-lender carries on business in one town under his registered trade name. Elsewhere he appears as a partner of a firm under another registered trade name. Usually the other partners are clerks or members of his family.

The idea is that the money-lender thus loses his identity in the other firm or firms in which he figures merely as a partner. For all practical purposes the businesses are the same, carried on under different names, with the intention and object of deceiving the public.

It is submitted, however, that even where the firm is a genuinely distinct business, the provision that a money-lender should carry on business in one name and one name only, does apply, but whether it would apply where he was also a member of a registered company is more than doubtful, unless, indeed, it was a "one man company."

By sub-section (2) of section 2 the penalties for non-observance of the above provisions are very severe, but here again the Act has become mere waste paper by the reported decision of the Commissioners of Inland Revenue not to prosecute unregistered money-lenders.

The immediate result of this decision is, I learn on good authority, that many professional money-lenders do not register, relying upon the knowledge that their customers are men of such a social status as to preclude them from setting the law in motion from fear of an *exposé*. On the other hand there appears to be nothing to prevent a money-lender who has failed to register, or has otherwise contravened section 2 from seeking to enforce his civil rights. It is submitted that in any proceedings the money-lender would be met by section 1, but if registration is desirable in itself, then all transactions with unregistered money-lenders should be void.

This serious blot might be amended by enacting that all such contracts should be absolutely void.

Although a money-lender is bound to register before commencing business the Commissioners of Inland Revenue cannot refuse to grant a certificate however long he may have carried on business unregistered, or whatever the character of the applicant. This defect might be amended by adopting the provisions of section 43 of the Pawnbrokers' Act, 1872.

Thus in vulgar language the bottom has been knocked out of this Act from which such great benefits were anticipated.

By Mr. Justice Ridley's decision the equitable doctrine is to be confined to, and enclosed within, the few decided cases in equity where the parties are not heirs, reversioners, or expectants, however harsh and unconscionable the transactions in question may be. Such a view is opposed to all the principles of jurisprudence and common-sense. It would be folly to attempt to define the fraud which will give ground for relief. In the words attributed to Lord Eldon in *Mortlock v. Buller*, (10 Ves. 306,) "The forms of fraud are such that were Courts of Equity once to lay down rules how far they would go and no further, in extending relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive."

The suggestion originally made by the Council of the Incorporated Law Society and recommended by the Select Committee of the House of Commons that money-lending cases should be heard *in camera* because in numerous instances borrowers are deterred from coming into court from a fear of exposure is so alien to the spirit of English judicial procedure that it has only to be stated to be rejected. Want of space forbids more than the mere mention of the other recommendations of the Select Committee, many of which are deserving of serious attention.

The Committee recommended that the minimum limit for all bills of sale should be raised to £50; that where money-lending transactions are conducted by means of absolute bills of sale accompanied by hire purchase agreements, such transactions should be declared either illegal or the hire purchase agreements should be registered with the bills of sale; that the case of warrants of attorney and cognovits in connection with all loans advanced by money-lenders should be abolished; that the money-lender should only be entitled to sue in the County Court of the district

where the borrower resides ; that statutory declarations should be made only before the registrar of the County Court, who should be required to fully explain their purpose to those making them ; that a money-lender should not be allowed to use the process of Summary Diligence unless the borrower is domiciled in Scotland ; that the Wages Attachment Abolition Act, 1870, should be extended to persons whose wages or salary together with any other income do not exceed £200 per annum, and that money-lenders should be compelled to keep strict accounts and to furnish a clear statement to the borrower, at due date, of his account. Nearly all these reforms, however, are controversial and must be the subject of further consideration. The prime essential at the present moment is by a short amending Act to render the present statute operative in accordance with the intention of the legislature. Whatever the result of the appeal in *Wilton v. Osburn*, the equitable doctrine should be made applicable upon the lines indicated ; section 2 should be amended, if found necessary ; non-registration and other evasions of the Act should disentitle the money-lender to enforce his civil remedies, and prosecutions by the Board of Inland Revenue for such non-registration or other evasions should be made compulsory.

It has been impossible to deal here with the ethical, economic, and political aspects of usury. Neither have I been able to touch upon the position of money-lending transactions in British India, from the consideration of which many valuable lessons may be derived. With this important branch of the law of usury I hope to deal in a subsequent article.

HUGH H. L. BELLOT.

## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### **The Congo Free State.**

The recently renewed proposal to annex the Congo State to Belgium is not likely to alter in any way the relations of that State to other nations; and indeed the contingency has been provided for from the beginning of the independent existence of the country, namely, in 1884, when under the name of the International Association of the Congo presided over by the King of the Belgians as a private individual, it concluded treaties with Austria, France, Germany, Great Britain, Holland, Italy, Russia, and the United States, in each of which it was provided that the Association should only cede any portion of the territory now or hereafter to be under its Government, subject to all its engagements under that treaty, as for example that the right of free trade secured to the subjects of the other contracting party should continue to be in vigour after every cession made to any new occupant of the country. Previously, however, in the same year the then President of the Association (M. Strauch) had made a formal declaration to the French Foreign Office that the Association would never cede its territories on the Congo, but that if it found itself obliged to sell them it would give the right of pre-emption to France; and the French Foreign Office treated this declaration as a formal one binding on the Congo State. In 1885 at the Berlin Conference on African affairs, the Congo State declared itself, and was recognised by the Powers there represented, as perpetually neutral; and the King of the Belgians (on being authorised by Belgium) assumed the sovereignty. In 1887 during negotiations between France and King Leopold for delimiting their Congo territories, the Congo State declared that its former recognition of France's right to pre-emption.



in case of any cession of its territory could not exclude the prior right of Belgium (which had the same Sovereign as itself), in this respect, but it admitted that it could not cede its territory to Belgium without imposing on her the obligation to recognise France's right to pre-emption. In 1890 King Leopold ceded to Belgium, in the event of his death, all his rights of sovereignty over the Congo State, and the French Government then notified the Belgian Foreign Minister (Baron Lambert) that France maintained her right under the former declaration. In 1894 this question again came up in connection with the then contemplated cession of the Congo State to Belgium; and a treaty was signed between France and Belgium in which the latter recognised formally the right of France to pre-emption of all its Congolese possessions and declared that it would never cede them gratuitously (August 4th).

One arrangement entered into by the Congo State deserves especial notice at the present time, viz., that with Great Britain in 1894 (May 14th). In that treaty, which delimited the respective boundaries of the two parties, King Leopold recognised the British sphere of influence on the Nile as defined in the Anglo German agreement of 1890 and including the Bahr el Ghazal province and extending to 10 deg. N., a line level with Fashoda; the British Government granted a lease to the King as Sovereign of the Congo of nearly the whole of the Bahr el Ghazal during his reign, which after his reign was to continue in force with regard to so much of this territory as lay West of 30 deg. E. so long as the Congo territory either independently or as a Belgian colony should remain under the sovereignty of the King and his successors; while the Congo State leased to Great Britain a strip of territory connecting Lake Tanganyika with Lake Albert Edward. Both these leases were declared to

have no political objects ; but on a protest by Germany, Great Britain gave up the latter lease. This agreement was largely neutralised by the Franco-Belgian treaty before mentioned, by which King Leopold undertook not to occupy or exercise any political rights in the Bahr el Ghazal, except in the most southerly portion ; and the Franco-Congolese boundary was declared to be a line passing inside the British sphere defined in the Congo State's agreement with Great Britain. The uncertainty with regard to the limits of British and French influence in the Nile Valley was, however, removed by the declaration of June 13th, 1899, supplemental to the Niger Convention of June 14th, 1898, under which France recognized the British boundary as defined in the British treaties with Germany and the Congo State (so that the lease of 1894 was consequently valid), though in the Bahr el Ghazal, as part of a commercial zone, British and French subjects were to enjoy equal trading rights for thirty years. Although the Congo State has never taken advantage of its rights under the lease of 1894 (owing to King Leopold's agreement with France, before mentioned), it would seem that that lease is still binding, unless it can be said that the present international situation in the Nile Valley has become so different from that existing at the time the lease was granted, that its terms are now inapplicable ; or, that Great Britain has succeeded to the rights of France under the restrictive covenant by the Congo State in its treaty with her. Neither of these grounds seem sufficient for objecting to the Congolese now opening up and settling the country.

### **Transvaal Concessions.**

The Report of the Commission appointed to inquire into the validity of concessions granted by the late Transvaal

Government to individuals and corporations—which in many cases amounted to monopolies of important branches of industry such as banking, railways, tramways, supply of water and light over various areas, and the manufacture of dynamite, and even articles of such general use and convenience as soap, bricks, leather, and the like—is a valuable contribution to a province of International law, namely the “succession” of one State to another, and the rights and liabilities springing therefrom, on which the opinion of jurists is not explicit and there has been little illustration in practice. The principles stated by the Commissioners as guiding their recommendations, and the course of procedure they adopted, do not seem to be open to any objection from the point of view of International law.

Strictly, according to International law, the new Government is only bound to recognise as binding upon it such acts and obligations as would have bound its predecessor. In Huber's words (*Staaten succession*, p. 150), while privileges, concessions, patents, and the like, granted by the former Government, continue in force until revoked, mere hopes, expectations, options, and concessions which have an illegal origin, or which have existed on sufferance, do not pass any rights against the successor. In English law, upon an annexation of territory by the Crown, the rule, no doubt, is that no right of action is given in the municipal Courts against the annexing Government in favour of persons claiming under a grant (even though valid) from the former Government, although the claimants are British subjects; their only remedy is by Petition of Right to the Crown. This remedy is not, however, probably open to neutrals, who must resort to diplomatic action by their Governments; but their Governments have the right to expect that the annexing Government will

fulfil its predecessors' just obligations, in the same way that British Courts allow a Government which succeeds another to enforce the rights of its predecessor against private persons (*United States v. McRae*, L.R., Eq. 327). The judgments of the Supreme Court of the United States (which, owing to its power of interpreting the provisions of treaties equally with statutes, and the series of acquisitions of territory by the Union, has had unique opportunities of adjudicating upon the validity of claims to concessions granted by the former Governments of annexed territories) contain some valuable guiding principles in this connection. That Court has declared that express provision in a treaty of cession is not required in order to protect private property in ceded territory; that the law of the ceded territory can be examined in order to see whether concessions claimed under grants from the former Government are valid, whether Congress has by Act submitted the titles to lands so claimed to judicial cognizance (as in some cases), or even without such statutory power; that equitable titles as well as legal ones should be recognised, and the grant need not be shown to have complied with every legal formality; that inchoate rights are of imperfect obligation, and affect only the conscience of the Sovereign, not being of such a nature (until the Sovereign gives them a validity and efficiency which they did not before possess), as a court of law or equity could enforce or recognise; and that a definitive title to a concession which had not received complete validity under the former Government may be confirmed by the Supreme Court under powers given by Act of Congress. It has also declared generally, that in deciding on such claims the Court is guided by the words of treaties (if any), the law of nations, the laws, usages, and customs of the former Government, and that the United States desire, to act in such cases as a great nation, not seeking, in extending their authority over the ceded country, to enforce

forfeitures, but to afford protection and security to all just rights which could have been claimed from the Government which they supersede. A liberal view has accordingly prevailed in its decisions on claims to concessions in Louisiana, California, Florida, and Mexico.

In one of the many concessions investigated, namely, that of the Netherlands South Africa Railway Company, a company having its domicile and seat of administration in Holland, the interesting point has been raised whether a company trading in a hostile country, but directed by a neutral administration in a neutral country, is liable to have its property confiscated on account of the active assistance rendered by its local administration and staff to the hostile Government, which under a power reserved to it in the contract of concession took over the whole working, *personnel* and *matériel*, of the railway on the outbreak of war, and commandeered for active warlike purposes the services of its staff of 2,700 men, of whom 623 were Afrianders, and 1,536 Hollanders, though all nationalities were represented in it. In ordinary circumstances the great bulk of the profits of working went to the Government, and it had the right of expropriation on terms. The Commissioners have recommended that the company should be held liable for the acts of their local administration and staff who were admittedly actively belligerent in transporting military materials and performing military services for the Transvaal Government, and that by analogy to the case of a neutral ship-carrying contraband of war, the company's property should be confiscated without compensation, just as a State-owned railway would have been, with the exception that the debenture holders whose conduct had been innocent and who had the guarantee of the Transvaal Government for

their principal (which had built the railway), and interest, should receive favourable consideration.

This recommendation has, as was only to be expected, led to a protest from the neutral shareholders, which seems well founded. In war the position of property on land is admittedly different from what it is at sea. In a prize court the property of any person or corporation trading in a hostile country or connected with such trade is liable to condemnation, but it is not suggested that this principle is applicable in the present case. Even in such a court, carriage of contraband by a neutral ship to which her owners are not privy does not render her liable to confiscation, but only to loss of freight and expenses; and it would hardly seem equitable to hold that the owners of a railway compulsorily taken possession of by the hostile Government are privy to its being used for carriage of contraband. The power reserved to the hostile Government to make use of the railway on the outbreak of war seems to make it immaterial what part was taken by the local management of the railway (if their acts bind the company) which was not traceable to the neutral administration abroad. The representatives of the foreign shareholders have pointed out that in the case of the Alsace-Lorraine railways in the Franco-German war of 1871, the rights of the shareholders were respected, and the full value of the shares was paid by Germany; but in that case there was no complaint of unneutral conduct. Considering the vast amount of British and foreign capital invested in similar undertakings in every State, it might constitute a dangerous precedent to allow a belligerent to confiscate the property of neutrals because of unneutral acts done by their local agents clearly outside the scope of their duties, for which the responsibility is not brought home to the controlling administration in neutral territory. From the

point of view of expediency, as well as justice, our Government will no doubt be willing to recognise the right of the shareholders to a certain amount of compensation on expropriation.

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### **Compensation to Deported Neutrals.**

The Commission now investigating the claims of neutral subjects for compensation in respect of their deportation from South Africa to Europe by the British military authorities announced at the outset of their enquiry that they would proceed on the general assumptions (1) that a General commanding an army in the field has the right to remove or expel during hostilities from the theatre of war all persons whose presence he may consider dangerous prejudicial or inconvenient upon military considerations, and to deport them to such a distance as will prevent their return; and (2) that every State has the right to expel aliens whose presence it considers dangerous. They have thus decided that persons merely deported from one part of South Africa to another have no right to compensation from the British Government; but that they will take into consideration any unnecessary hardships caused by deportation, and will recommend an amount of compensation enough to make good the direct loss sustained by such persons owing to the action of the military authorities.

It is now a recognised principle of International law that a Government is not responsible for injuries done to its own subjects or to foreign subjects in the course of insurrection or civil commotion or international war. Thus a claim by England for compensation to be made to British subjects for losses suffered during the revolutions in Naples and Florence in 1850 was successfully protested against by Austria and Russia. In 1851 the United States refused as a matter of principle to make compensation for injuries done to Spanish subjects in a riot at New

Orleans, although they made reparation for disrespect shown to the Spanish flag and the house of the Spanish Consul which was under their protection, and during the American Civil War all the European Governments refused to demand compensations for injuries inflicted by the forces of the United States upon the property of their subjects. Usually, however, compensation is made as an act of grace by the Government to subjects of other nations in such cases. In 1871 the French Assembly voted an indemnity for the relief of all sufferers by the war whether Frenchmen or foreigners. Italy and France mutually made compensation for injuries done to their respective subjects in the riots at Aigues Mortes and Genoa in 1892; and recently the United States paid an indemnity to the representatives of Italians who had lost life or property in riots at New Orleans.

The most recent illustration of the second assumption above stated is the case of the expulsion of Mr. Ben Tillett from Antwerp in 1896 by the Belgian Government which on reference to arbitration decided in favour of the Belgian Government on the ground that their action was justifiable upon grounds of public order. In English law it is a moot point whether the Crown possesses power by prerogative to expel any "alien amy" from the kingdom or to exclude him from entering it. This cannot be justified as an act of state, and probably can only be done under special statutory power.

The right of angary, or the right of a belligerent to use or destroy the property of neutrals even when only temporarily within the hostile territory with a reservation of indemnification was asserted by the Germans in the war of 1870-1871 (Hall p. 766). In a case during the same war before the French Prize Court, the owners of neutral property



on board a German ship, which had been destroyed by its French captors instead of being brought into port because they could not spare a prize crew for her, were refused an indemnity on the ground that the provision of the Declaration of Paris that "neutral goods on board an enemy's vessel cannot be seized" did not import that an indemnity can be claimed for injury caused either by a legally valid capture of the ship or by acts of war accompanying or following the capture (Hall, p. 744; Calvo: 2,817). It is, however, important that the rights of neutrals should be upheld to the full extent contemplated by the Declaration of Paris and the practice in land warfare; and that interference with their persons or property should only be allowed under pressure of a real military necessity.

#### **Ex-territorial Post Offices.**

The protest made by the Turkish Government against the continuance of the foreign post offices in Turkey, though now withdrawn, has at least called attention to the anomaly of a State which is a party to the General Postal Union being obliged to allow ex-territorial post offices for foreigners. Lord Cranborne has explained that the practice originated under the Russo-Turkish treaty of 1783, under which the Russian mails have been distributed by a special Russian post office in the Consulate General for many years; that French, British, and German post offices were subsequently established on the ground that these States had the same privileges as Russia under their treaties with Turkey; that the special British post office in Constantinople is only available for letters, and that articles dutiable or sent by parcel post go through the Turkish Custom House; and that the arrangement was of long standing and was rendered necessary by the absence of security that the Turkish Government could efficiently replace the foreign post offices.

There is no express provision on the subject in the Capitulations (1675-1817) which only gave British subjects all rights then granted to the Venetians and other foreigners; but the treaty of 1861 gave them all the rights granted by the Porte to subjects of the most favoured nations. The Russo-Turkish treaty of 1783 (which put Russians on the same terms as French and British subjects under the Capitulations) does not in terms confer the privilege unless this meaning can be given to a provision that "in order to facilitate the commerce of the subjects of the contracting parties, as well as their neutral correspondence, the Sublime Porte engages to provide for means of celerity, safety, and convenience of the post and the Russian couriers who come and go to the frontiers of Russia, and the Russian Court engages to the same effect" (Art. 76). Probably the existence of these special post offices is due to the practice of treating the privilege accorded to the correspondence of the embassies and consulates as covering the private correspondence of subjects of their respective countries carried by the same means. Other examples of ex-territorial post offices (under the Postal Union), all of which, however, are in countries not members of the Postal Union, are afforded by the French, British, German, and Japanese post offices at Shanghai and other treaty ports in China, the British, Spanish and French ones at various places in Morocco, the Italian ones at Tripoli and Tunis, that of Great Britain at Muscat, and that of France in the Society Islands.

### **The United States Insular Cases.**

In connection with the International law of doctrine of State succession mentioned on page 482, it may be noticed that the Supreme Court of the United States has been called upon recently to decide certain questions of the highest im-

portance in the Constitutional law of the United States arising out of the acquisition of Porto Rico and their occupation of Cuba and the consequent relation of these islands to the States and Territories of the Union. In *Downes v. Bidwell*, the Court, by a majority of one vote in a tribunal of nine members, has decided that Porto Rico, while in an international sense not a foreign country as being subject to the sovereignty of and being owned by the United States, is a foreign country in a domestic sense, so that all the provisions of the Constitution do not apply to it, and a tariff upon trade between Porto Rico and the United States is consequently lawful, that island not having been incorporated into the United States, but being merely appurtenant thereto as a possession. In another case, *De Lima v. Bidwell*, the same Court had held, that for the purposes of the Tariff Act, Porto Rico had ceased to be a foreign country, and had become a domestic territory of the United States. The same court had previously (180 U.S. 119) held that Cuba was a foreign country or territory for the purposes of the Act of Congress of June 6th, 1900, the United States having disclaimed any disposition or intention to exercise sovereignty, jurisdiction, or control over Cuba except for its pacification, and having asserted its determination when that was accomplished to leave the government and control of the island to its people, although as between the United States and all foreign nations Cuba was treated as if it were conquered territory.

By International law the nature of the relations existing between a State and the territories which it has acquired, occupied, or annexed, is immaterial so far as other nations are concerned. Mere occupation or control is enough to give the full rights and duties of a territorial sovereign and to substitute the occupying or controlling State for the former sovereign of that territory. International law recognises the principle of "succession" in treaties, where one

party to a treaty has become incorporated in another State; but, according to the more general opinion this effect is only allowed to "territorial" treaties, such as treaties relating to boundaries, the navigation of rivers, railways and the like, while treaties of a personal or political character, such as those relating to alliances, subsidies, and commerce are not considered to bind the new sovereign or the other party. The continuance of treaties relating to subjects of law, such as those dealing with the post, literary and artistic property, and extradition, seem to depend upon the special conditions of law and administration of the States concerned, and unless a change is soon announced other States are considered to be justified in treating the arrangements made with the old State as continuing with the new. The obligations of the old State which pass to the new sovereign only apply to the territory comprised in the old State; but the already existing treaties between the new sovereign and other States apply to the newly acquired territory (see Huber : *Staten succession*, p. 153).

### Recent Cases.

In the case of *Driefontein Consolidated Mines v. Janson* (see Ante, Vol. XXV., 491) the Court of Appeal by a majority have upheld the judgment of Mr. Justice Mathew in favour of an owner of exported gold bars seized by agents of the late Transvaal Government in its transit from that country, who had insured it with the defendant against "enemies, pirates, rovers, arrests of all kings, princes, and people, etc." (the ordinary Lloyds' policy clause). The Master of the Rolls based his judgment chiefly on the ground that neither the plaintiff, although a Company registered in South Africa, nor the persons to whom the beneficial interest in the gold belonged and who were not resident in the Transvaal were enemies

of this country at the time of the seizure, as a state of war did not then exist. Lord Justice Vaughan Williams dissented on the ground that it was against public policy for a British subject to be obliged to indemnify the subject of a foreign enemy against a loss caused by the act of that subjects Government, and doubted whether an agreement by the parties (in order to get the action tried) that the war should be treated as at an end could override the principle of International law, that a hostile alien could not sue in a British Court until the war was at an end; but Lord Justice Romer, agreeing with the Master of the Rolls, pointed out that with the annexation of the Transvaal this last difficulty was removed. If, as according to the modern theory and practice, annexation leaves all private legal rights in full force, it should also have the legal consequence of bringing into force again the legal remedies arising out of legal relations between the subjects of mutually hostile States, which in English law are only suspended and not cancelled by the outbreak of war.

In *Attorney General v. Winau* (83 L.T., 634), a case depending on domicile, it was held that where a foreigner by his acts justifies the assumption that he intends to make his home for an indefinite time in England, an English Court can hold that he has acquired a domicile of choice here. In *In re Megret* ([1901] 1 Ch. 547), where an English woman married a domiciled Frenchman, and English personalty was made subject to a settlement drawn in English form with English trustees and giving the wife power to deal with the property, the Court held that the settlement was governed by English law, and the wife could dispose of it free from the limitations imposed by French law.

G. G. PHILLIMORE.

## VII.—NOTES ON RECENT CASES (ENGLISH).

The well-known legal maxim *nemo debet bis vexari pro unâ et eâdem causâ* has received some further elucidation in the lately-decided case, *Pickford* (App.) v. *Corsi* (Resp.) ([1901] 2 K.B. 212). An information had been preferred against Corsi, the respondent, by Pickford, the appellant, at a court of summary jurisdiction, under section 33 of the Pawnbrokers' Act, 1872 (35 & 36 Vict. c. 93), charging him with knowingly and designedly pawning with Pickford, the appellant, who was a pawnbroker, two rings, the property of another person (a lady) without her consent. The information was dismissed. The owner of the rings had previously charged Corsi, the respondent, with stealing the rings, and he had been summarily convicted thereof. Pickford, the appellant, however, declined to give up the rings to the owner, and she thereupon issued a summons against him under section 27 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71) for unlawfully refusing to deliver the rings to her. Pickford was ordered to deliver up the rings to the owner on payment by her of £3, they having been pawned for £6. This Pickford did. The information, which was dismissed, sought to cause Corsi to be punished for his illegal pawning, but the magistrate thought that Corsi, having been convicted of the larceny of the rings, could not be convicted of another offence in respect of the same property and upon the same facts. The Divisional Court (Lord Alverstone, C.J., and Lawrance, J.), however, remitted the case to the magistrate for reconsideration holding that the fact of Corsi, the respondent, having been convicted of larceny of the rings did not prevent proceedings being taken against him under section 33 of the Pawnbrokers' Act, 1872. There is a broad distinction between cases in which the same facts and evidence go to establish the same offence, and cases in

which they establish different offences of different degree. In *Funcett v. Bierman* ([1897], 14 *Times* L.R., 148), it was held that the pawnbroker is a person injured under section 33 of the Pawnbrokers' Act, 1872, and the offence against the pawnbroker is a separate offence from that against the owner of the property. The magistrate was wrong in thinking that a second prosecution, upon the same evidence, was barred like a second prosecution for the same offence, for this distinction was most clearly pointed out by the Court for Crown Cases Reserved in the exhaustive judgments in the important case of *Reg. v. Ollis* ([1900] 2 Q.B., 758-780).

The Court of Appeal (Smith, M.R., Collins and Romer, L.JJ.) affirmed the decision of Mathew, J., in *Levitt and Thornton v. Humble* ([1901] 2 K.B., 53). The plaintiffs brought the action against the defendants to recover damages for breach of contract to purchase 300 shares in a particular company. The plaintiffs were jobbers on the Stock Exchange. The defendant instructed P., a broker on the Stock Exchange, at the mid-December account, to carry over 640 shares of the same company for him for the end of December account. P. carried over 890 of these shares, with various jobbers, for the plaintiffs and for others. 300 shares were carried over with the plaintiffs at £57, and P. alleged that he had appropriated these to the defendant. On the 15th December, P. was declared defaulter on the Stock Exchange, and the official assignee fixed the hammer price of the shares at £57, in accordance with the Stock Exchange Rules. It was proved at the trial that by the usage of the Stock Exchange, when a broker becomes a defaulter the customer was bound to complete a contract which the broker had made for the customer with a jobber, either

with the jobber direct, or through another broker, and that the customer had no option to close the transaction at the hammer price without the consent of the jobber. The Court held that the customer had no option to close the transaction at the hammer price, that there was privity of contract between the plaintiffs and the defendant, and that the transaction was not closed between them by the operation of the Stock Exchange Rules. This decision follows that of *Anderson and Co. v. Beard* ([1900] 2 Q.B. 260), a case where it had been assumed that there was an option in a customer, after the broker had been declared a defaulter, to close at the hammer price, and *Beckhuson and Gibbs v. Hamblet* ([1900] 2 Q.B. 18), where it was held that there is privity between the jobber and the customer, and *ex parte Grant, In re Plumby* (13 Ch. D. 667), where it was held that certain Rules of the Stock Exchange apply to the domestic affairs of the Stock Exchange and do not apply to the outside public.

The Divisional Court in *Bland (Pet.) v. Buchanan (Resp.)* ([1901] 2 K.B. 75) decided that an outgoing Mayor is entitled to vote as a Town Councillor at the election of the new Mayor, and if the votes are equal, he can also give a casting vote. This decision follows the judgment of two judges in an election petition, *Nell v. Longbottom* ([1894] 1 Q.B. 767). As to the vote of the outgoing Mayor, the general policy of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) seems to be to retain the Mayor in office until his successor has been appointed. As to the casting vote, although there is nothing in the Statute authorising it, it is a convenient course to be pursued, and the judgment of the Divisional Court in the above-mentioned case has now made it law.



In *Drury v. N.E. Railway Company* ([1951] 2 K.B. 322), the Divisional Court held that the County Court Judge at Howden was wrong in his law, in deciding where a passenger got out of a railway carriage, and left the door open, and the plaintiff (another passenger) sitting in the carriage put out his hand and the door was shut on it by a servant of the company who came from behind where the plaintiff was sitting, that there was evidence of negligence.

Again, the same Court decided in *Duckworth v. Lancashire and Yorkshire Railway Company* (111 L. T. 11) that where the plaintiff took a ticket by a train, which usually occupies three minutes in travelling from R. to B., but on the occasion in question was stopped *en route*, owing to the signal being against it, through the negligence of the signalman, and was twenty-two minutes late in reaching B., and the plaintiff (a weaver) lost his day's work thereby, he could not recover damages. There was no denial on the part of the Company that the signalman had been guilty of negligence, but they relied on the fact that the ticket was issued "subject to the regulations contained in the Company's time tables." These regulations contained (*inter alia*) a notice that the Company would not "under any circumstances be held responsible for delay or detention however occasioned, or any negligence arising therefrom." This decision is in conformity with *Le Blanche v. L. and N. W. Railway Company* (1 C. P. D. 286) and with *McCartan v. The N.E. Railway Company* (51 L. J. Rep. 441), the rule of law being that the conditions in time tables form part of the contract. It would appear from this that the law relating to the liability of Railway Companies in regard to passengers requires amendment on the lines of the Railway and Canal Traffic Act, 1854.

Another case of want of evidence of survivorship occurred in *In Bonis Beynon* (110 L.T. 428), where Beynon and his wife, being engaged as missionaries under the British and Foreign Bible Society in North China, were massacred on July 9th, 1900. There was not the least doubt but that the unfortunate victims and their three children were then put to death by the Chinese, but there was no evidence of who died first. The Court of Probate (Barnes, J.), following *In Bonis Wainwright* (1 Sw. & Tr. 257), granted administration of the personal estate of B. to his father as next of kin, and of the personal estate of B.'s wife to her sister as next of kin. There is a similar case *In Bonis Ewart* (1 Sw. & Tr. 258), arising out of the massacre of Europeans at Cawnpore, by Nana Sahib, in 1857; but the Court has not always so decided. In *Sillick v. Booth* (1 Y. & C., C.C. 126), where two brothers were lost at sea together, one of them being of the age of twenty-eight and the other under twenty-one, without any evidence of circumstances to indicate the survivor, Vice-Chancellor Knight Bruce held that the elder brother, as the stronger and more experienced sailor, must be presumed to have survived the younger.

The earliest reported instance of disputed survivorship had reference to a father and son, who were condemned to death for a felony, and were hanged together out of the same cart. If the son survived, his wife was entitled to dower out of the lands in question; and the jury having found that the son struggled longest, he was adjudged to be the survivor, and his wife had her dower (*Broughton v. Randall*, Croke's R. Temp. Eliz., 503). But the most celebrated case in English law books is that of General Stanwix, who perished at sea, with his only daughter and his second wife, on the passage from England to Ireland, when all on board were lost, and no evidence whatever could be obtained for

the guidance of the Court (Fearn's Posthumous Works, 35). The question was, whether or not General Stanwix survived his daughter; and there were three contingencies: either the daughter survived the father, or the father the daughter, or both perished at the same instant. In 1772 the question of survivorship between them was argued in the Court of Chancery on behalf of the representatives of each party, but there was no positive evidence of any kind and the arguments upon the probabilities are said to have been so perplexing that the Court avoided a decision; eventually the case was compromised on the recommendation of Lord Mansfield, who said that there was no legal principle on which he could decide it (Hubback, On Succession 189). The accounts of famine at sea prove that the young (not adult), die of hunger before the old; on the principle that those to whom aliment performs the two-fold function, of affording sustenance and the means of growth, are most acutely sensible of its deprivation. Such young persons, therefore, are found to yield soonest to this cause of death. With respect to persons killed in action, different considerations prevail. The Roman Law (Dig. Lib. 34, tit. 5, 1, 9) provided that if a father and his adult son perished in the same battle, the son, in the absence of evidence to the contrary, should be presumed to have been the survivor: and this presumption was followed in a remarkable French case (Hubback, On Succession, 760). A father and his son fell at the battle of Dunes in 1658, and the daughter of the former became a nun, and civilly dead, on the same day at noon, which was the hour when the battle commenced. On the question of survivorship among the three, it was decided that the nun died first, on the ground that her vows, as voluntary acts, would be consummated in a moment; whereas, the deaths of the father and the son being violent, there was a possibility of their living after receiving their

wounds. As between the father and the son, therefore, after some argument, the Court resolved to follow the Roman law, and to presume that the son, being of the age of puberty, had survived his father.

The case of *Victorian Railway Commissioners* (App.) v. *Coultas and wife* (Resp.) (58 L.T. Rep. 390), which was determined by the Privy Council in 1888, decided where a husband and wife were crossing a line on a level crossing, the gate of which has been negligently left open by the Company's servants, and while they were in the act of crossing, a train came by at high speed and they narrowly escaped being run over, but did not sustain any physical injury, yet the wife fainted with terror and suffered a shock to her nervous system, and was ill for a long time, that damages for the injury sustained by the female respondent and the consequent expenses caused to her husband were too remote to be recovered in an action. This decision was quoted in *Pugh v. London, Brighton and South Coast Railway Company* (74 L.T. Rep. 724), before the Court of Appeal in 1896, but was deemed by the court to be a different kind of case from that then before it. In the case, however, of *Dulieu v. R. White & Sons* (111 L.T.N. 158), just decided by a Divisional Court (Kennedy and Phillimore, JJ.), a horse belonging to the defendants being negligently driven came into the public-house where the wife of the plaintiff was sitting behind the bar. The horse did not come into physical contact with the plaintiff, but its sudden appearance frightened her greatly, and in consequence of this fright, she being then *enceinte*, suffered a miscarriage. It was contended on the principle laid down by the Privy Council in the above case of *Victorian Railway Commissioners v. Coultas and wife* that damage due to mere fright caused by negligence without any malice is not in itself actionable. The Court, however, held that

the last-mentioned case was not binding on an English Court, and would not be followed in the case then before it, and decided in favour of the plaintiffs.

In *Durant and Co. v. Roberts and Keighley, Maxsted and Co.* ([1900] 1 Q.B. 629) the Court of Appeal determined, in an action for non-acceptance of wheat sold by the plaintiffs to the defendants, that a contract made by a person intending to contract on behalf of another but without his authority, may be ratified by that other, and so made his own, although the person who made the contract did not profess at the time of making it to be acting on behalf of a principal. This the House of Lords have reversed (111 L.T.N. 83), holding that when a man makes a contract in his own name without disclosing that he is acting as an agent, and without any authority so to act, but with an intention in his own mind to make the contract on behalf of another person, that person cannot ratify the contract. In the Court of Appeal, A. L. Smith, L.J., had dissented from the other judges, and thereupon must be deemed to be on the side of the House of Lords. The decision is a very important one, and of necessity throws discredit on several earlier cases, such as *Watson v. Swann* (11 C.B., N.S. 769) and *Tiedemann v. Ledermann* ([1899] 2 Q.B. 63).

It is by no means easy to gather from the cases on the subject when a claim can be said to have been as of right within the meaning of the Prescription Act (2 & 3 Will. IV. c. 71); one or two points, however, are plain. In order that the claim may be as of right, the enjoyment must have been in the language of the Civil Law *nec vi nec clam nec precario* (Dig. lib. 39, tit. 3. *de aqua*). It must not have been *vi*; it must have been peaceable. It must not have been *clam*, for it must have been open. This follows the requirement that it must be peaceable. If the claimant had not

concealed his enjoyment, it might have been disputed. Concealed enjoyment does not look like a rightful one. In *Union Lighterage Company v. London Graving Dock Company* (111 L.T.N. 9), the plaintiffs purchased land adjoining a dry dock which was supported by piles and ties which were on the plaintiffs' land. The conveyances to both parties were from a common owner, and it was admitted that if the Prescription Act applied, enjoyment began in 1877. The plaintiffs relied on *Weldon v. Burrows* (41 L. T. Rep. 327; 12 Ch. D. 31), that there was no implied reservation of the right of support, as an easement of necessity, and that their attention ought to have been called to any reservation that the enjoyment was *clam*, and that no right could have been acquired by the defendants. The defendants urged that this enjoyment was not *clam*, because some of the nuts were plainly visible on the outside of piles on the plaintiffs' land and were evidence of the intention of the common owner to reserve a right of support for the dock, which was in fact an easement of necessity. It was held by the Court (Cozens-Hardy, J.) that the nuts visible on the plaintiffs' land would not suggest the presence of iron ties supporting the plaintiffs' dock to anyone, except a skilled expert, and that the defendants were not entitled to retain the iron ties to support their dry dock in the plaintiffs' land. This is an important decision. It seems, therefore, that the enjoyment as of right must mean an enjoyment had not secretly, or by stealth, or by tacit sufferance, or by permission asked from time to time, but an enjoyment had openly, notoriously, not with particular leave at the time, but as a matter of right. And this, whether strictly legal by prescription and adverse uses, or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass as by consent or agreement in writing.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Ruling Cases.* Edited by ROBERT CAMPBELL, M.A. Vol. XXIII.

Relief (of the Able-Bodied)—Sea. London: Stevens and Sons. 1901.

This volume contains two very important headings, Sale of Goods, and Sea. It can have been no easy task to select representative cases from the mass of decisions dealing with the former; but by the help of 33 cases the subject has been divided into six sections, ranging from the inception of the contract, *i.e.*, Section I. Contract. Statute of Frauds, to Section VI. Action for Breach, Measure of Damages. The notes to most of the sections are not very important, as the necessity for them has been largely done away with by the Sale of Goods Act, but those there are, are useful. The American notes are generally even shorter. On most points the law in America is the same as our own, but it is interesting to note some differences. For instance, the doctrine of markets overt has never gained a foothold in the United States; and although not unanimous, the weight of American authority supports the proposition "that when property is sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent." It would also appear that it is rather doubtful whether the weight of American authority is not opposed to the later English decisions on the question of the position of the parties to a contract, when one has made default in relation to an instalment. "Sea" is treated under the following heads: Regulations for Preventing Collisions at Sea; Sea-Shore; Sea-Walls and Protective Works; Wrecks. The most important notes to these sections are, the English notes on Sea-shore (where the merits of Mr. Stuart Moore's valuable work on the History and Law relating to the Fore-shore are fully recognised), and the American notes on Collisions at Sea. There are interesting notes on the "Relief of the Able-Bodied" in both countries; and among other subjects well treated are Estate Duty and Riparian Owner.

*The English Reports.* Edinburgh and London. William Green and Sons. Stevens and Sons. 1901. Vols II.-VIII.

This important work is being carried out with commendable celerity, and the seven volumes which we have before us contain

the following reports :—Brown, Volumes II.-VIII., Dow, Volumes I.-VI., Bligh, Volumes I.-IV., Ditto, N.S., Volumes I.-XI., Dow and Clark, Volumes I.-II., Clark and Finnely, Volumes I.-XII., ranging over a period of nearly 150 years. Of course, a certain amount of this is repetition, as in the later volumes we find the same case reported in different reports, but this of course is unavoidable, and has some advantages, as there are often facts stated in one report which are omitted in another. There are numbers of cases in the earlier volumes under the Irish Penal Laws, which, though now fortunately useless for the purposes of legal information, are full of instruction for historical purposes. There are also a number of cases connected with the law of Tithes, which we do not think are likely to be referred to again. It is impossible to mention many of the important cases reported, but it may be interesting to refer to a few in each volume. The most important cases in Volume II. are probably the well-known cases of *Lickbarrow v. Mason* as to stoppage *in transitu*; *Markreth v. For* on purchase by a trustee; and *Lynch v. Dalzell* on insurance. A curious and interesting case is *Basil v. Atcheson* which decided that "It has been the constant rule of Courts of Equity in Ireland, that where, by a general and national calamity, nothing is made out of lands which are a fund for the payment of interest, no interest ought to run during the continuance of such public calamity." In *Galway (Town) v. Russell* are given some interesting facts connected with the history of Galway, and *Marlborough (Duchess of) v. Strong* deals with further litigation connected with the building of Blenheim. *Rochester (Bishop of) v. A. G.* relates a curious dispute about the building of a lodging for the King's scholars in Westminster School. We notice a little slip in the reference to *Huntington v. Attrill*; it is reported 1893 A.C., not 1892. In Volume III. we may call attention to the very important decision on Scotch Law of *Redfearn v. Somerrail*, that in *Hurkins v. R.*, and the most important constitutional case of *Burdett v. Abbot*; while golf players will read with interest *Dempster v. Cleghorn*; in which was discussed the relative rights of rabbits and golf players on St. Andrew's links. The judgment of Lord Eldon in *Kellett v. Kellett* is worth reading on account of the very great amount of uncertainty which that learned Judge displayed, he expresses himself thus:—"I should very much misrepresent the state of mind with respect to this question, if I did not say that it is a state of infinite doubt—I cannot say that the decision in this case is wrong, and I cannot



say that it is right—I do not know what the state of my noble friend's (Redesdale's) mind is, as to the question of intention; but if he finds as much difficulty in it as I do, I feel for him." Volume IV. begins with a curious misprint, as we find Sir William Alexander stated to have been chief baron for no less a period than from 1724-1831. There are also a few more misprints in this volume; which would seem to have been less carefully revised than the others. There are some important Scotch cases such as *Ker v. Wauchope*, *Queensberry Leases*, which Lord Eldon declared to be "unquestionably the most weighty and important cause, which, in the course of my professional life, either at the Bar or in a judicial situation, I had ever had occasion to consider," and *Stirling v. Forrester*. Other important cases are *Jessen v. Wright*; *Rowe v. Young* which necessitated the passing of an Act of Parliament; *Cholmondeley v. Clinton*; *A. G. v. Dublin (Mayor of)*, and *Hullett v. King of Spain*. It is curious to notice how Zachary Macaulay's exertions on behalf of the abolition of Slavery involved him in a libel suit in *Macaulay v. Shawell*. In Volume V. *Rothchild v. Brookman*, *Cadell v. Palmer*, and *Lynn Regis v. Henley* are important cases, it also contains the *Deron Peerage Claim*; *Birtchistle v. Vardill* and *Warrender v. Warrender*, both leading cases on questions of domicile, and two cases connected with the frauds committed by the notorious Fauntleroy. In the Sixth Volume we may call attention to *Oakely v. Pasheller*; another case of *Hullett v. King of Spain*; *R. v. Yarborough (Lord)*, and *Islington Market Bill*.

The Seventh Volume contains the important cases of *Don v. Lippmann*; *Athwood v. Small*, and *Duncan v. Finlatter*. There are also a number of interesting Peerage cases, including the *Vane Peerage*; the *Earl of Roscommon's Claim*, and the *Braye Peerage*. There is a curious case *Phillips v. Innes*, as to whether a barber's apprentice in Scotland could be lawfully required to shave customers on Sunday; and it is rather surprising to find that it was considered and distinguished as lately as last year. The most important cases in the Eighth Volume are the *O'Connell* case and *R. v. Millis*; there are also a number of Peerage cases of which the best known are the *Sussex* and the *Hastings* cases. We may also call attention to the cases of *Purves v. Landell*, *Brown v. Boorman*, and *Ferguson v. Kinnoull (Earl of)*. The volumes have been most carefully and judiciously edited, and the learning and research required for this work must have been very great indeed.

- A Century of Law Reform.* London: Macmillan and Co. 1901.  
*Real and Personal Property.* By J. E. R. DE VILLIERS, LL.M.  
 London: C. J. Clay and Sons. 1901.

Both these works treat of the history of the changes in the Law; the first during the past century and the second during the reign of Queen Victoria. Their styles are very different, as will at once be understood, when we point out that the former contains the substance of a series of twelve lectures delivered at the request of the Council of Legal Education; while the latter is the Yorke Prize Essay for 1900. The lectures are a pleasure to read, excellently set out by paper and type, and delivered by such masters of their subjects as, among others, Messrs. Blake Odgers, K.C., Augustine Birrell, K.C., A. H. Ruegg, K.C., and Sir Harry Poland, K.C. They combine amusement with instruction in an unusual degree; and a list of the subjects of the lectures will show over how wide a range they extend. The first lecture was on Changes in the Common Law and in the Law of Persons, in the Legal Profession, and in Legal Education. Then come Changes in Criminal Law and Procedure; International Law, Private and Public; Changes in the Constitution, etc.; Changes in Domestic Legislation; Changes in Equity, Procedure, and Principles; Changes in Procedure and in the Law of Evidence; Changes in the Law of England affecting Labour; Changes in the Law of Real Property (two); Changes in the Law affecting the Rights, Status, and Liabilities of Married Women; and last of all the History of Joint Stock and Limited Liability Companies. It is nice to compare the title deeds which were once spoken of by Lord Westbury as being "difficult to read impossible to understand and disgusting to touch," with the present substitute the land certificate, and think of the future landowner in the sympathetic view of Mr. Underhill. "The bulky and imposing sheepskin so familiar to us all, on which in the pompous metaphor of legal writers, a landowner is entitled to sit, will gradually give place to this single attenuated document; so that apparently in the fulness of time, the English land-owner will become a kind of territorial cherub."

Mr. de Villiers has not limited his studies to law books, but has delved among the "Reports of Royal Commissions and Select Committees, and the evidence of witnesses examined by them," the pages of Hansard, and treatises on political economy and jurisprudence. The result is that he has given us a very clear

account of the history of the various branches of law on which he treats, the grievances complained of, the arguments for and against changes, and the remedies applied. His subjects are: Land Transfer and Title; Tenures and their Incidents; Testaments and Intestacy; Monopolies; Commercial Law; and Debts and Securities. He does not deal only with changes accomplished, attempted, and probable; he is a keen reformer and believes in the abolishment of settlements, and future compulsory division of inheritances. His chapter on Monopolies is specially interesting, as the different views on Patents and Copyrights are clearly and vigorously set out. There can be no doubt as to the ability and knowledge expended on this Essay.

*Poor Law Statutes.* VOL. 1. By JAMES BROOKE LITTLE, B.A.  
London: Shaw and Sons. 1901.

This important work will be complete in three volumes, and is intended to "serve as a complete book of reference upon all questions arising upon the Statutes relating to or connected with the Poor Law." More than 50 Acts of Parliament on this subject have been passed since the publication of the last collection of Poor Law Statutes, many of them important. Some idea of the labour involved may be given when it is seen that there are included in this work more than 350 Acts of Parliament. These have not of course been all printed and annotated in their entirety, this would have made the work uselessly bulky; but the following method has been pursued: All Acts dealing wholly or mainly with Poor Law matters are printed in full and fully annotated; Acts relating to Local Government, as well as the Poor Law, are, for the most part, printed in full, but the annotations are mainly directed to matters connected with the Poor Law. The present volume contains the Statutes from 43 Eliz. c. 2. to 6 & 7 Will. IV. c. 96. As a good illustration of the way in which the statutes are treated we may point out that the first-named statute with the notes thereon occupies 120 pages and the next statute, 13 & 14 Car. II. c. 12, Poor Relief Act, 1662, nearly 50, while the Poor Law Amendment Act, 1834, 4 & 5 Will. IV. c. 76, takes up over 60. No unnecessary cases are cited and all obsolete matter is judiciously eliminated. There is a full index, and it is intended that there shall be an index to each volume, and a complete index to the whole work in the last volume.

## BOOKS ON COMPANY LAW.

Second Edition. *A Manual of Company Law.* By WILLIAM FREDERICK HAMILTON, LL.D., K.C., assisted by PERCY TINDAL-ROBERTSON, B.A. London: Stevens and Sons. 1901.

Third Edition. *Company Law.* By Francis Beaufort Palmer. London: Stevens and Sons. 1901.

*A Treatise on Company Law under the Acts 1862-1900.* By G. F. EMERY, I.L.M. London: Effingham Wilson. 1901.

*The Companies Acts, 1862-1900.* By WILLIAM GODDEN, LL.B., B.A., and STAMFORD HUTTON. London: Effingham Wilson. 1901.

*The Elements of Company Law.* By F. GORE-BROWNE, M.A. London: Jordan and Sons. 1901.

As might be expected, the literary result of the Company Act 1900 has been, first, a number of small books treating of that Act, and later on, new editions of works on Company Law, including the same Act and bringing Company Law up to date.

It has also encouraged the appearance of new works on Company Law. A number of treatises on the Act of 1900 were noticed in our last number, and we give above the names of some of the more comprehensive works embracing the whole field either of Company Law, or of the Company Acts, which is very much the same thing. These vary in their scope and method, and are adapted to the wants of various classes. Messrs. Godden and Hutton have carried out their object of reproducing "all the existing Statute law on the subject in the most portable and handy form for use in the office, and at meetings of directors or shareholders." This book contains all the Companies Acts 1862-1890, the Forged Transfers Acts, and the Forms and Fees prescribed by the Board of Trade for use under the Companies Act 1900. Cross references are given to other sections, but there are no other notes or references. The index is very full and good.

Mr. Gore-Browne's *Elements of Company Law* is the publication of a series of six lectures delivered before the Institute of Secretaries. Though it only purports to treat on elements, it gives a very comprehensive view of the law in a limited space; it is very clear and readable, deals with questions from a practical point of view, and often gives authorities on points which are left

untouched in more ambitious volumes. The statement of a practitioner of his experience, that the Act of 1900 has "in the judgment of many competent persons created more difficulties and dangers than it has removed," is worth noting.

Mr. Emery has adopted an ingenious plan of making the Company Acts speak for themselves. The whole career of a Company from "Incorporation" to "Reconstruction" is set out by judiciously selected and skilfully arranged extracts from the Company Acts, with accompanying notes. These notes are clear and useful, but the dates of the cases are in several instances given inaccurately, and the statement that a shipping company has not an implied power to borrow is not justified by the case cited, *i.e.*, *Australian Auxiliary Steam Clipper Co. v. Mounsey*, which is cited, and we think more correctly, by Mr Gore-Browne as an authority for the opposite proposition. The subject is one on which our learned authors find it difficult to agree. Mr. Gore-Browne considers that both shipping companies and colliery companies have implied powers to borrow; Mr. Emery says that neither shipping companies nor mining companies have such a power; and Mr. Hamilton decides that a shipping company has it, but that a mining company has not. Mr. Palmer unfortunately does not help us to settle this knotty point. The two other books on our list are both excellent, and though their arrangements are somewhat different they cover the whole ground in a most exhaustive and satisfactory manner. The authors, being not only sound lawyers but of great experience in company matters, they know what points of difficulty have arisen, and are likely to arise, and can give not only what the law is, or should be if the point has not yet arisen, but also give good practical advice which may prevent many a difficulty arising. A good illustration of this can be seen by turning to the excellent advice Mr. Hamilton gives on pages 404 *et seq.* to all persons who are requested to become directors of new companies. Mr. Hamilton has resolved the Companies Acts into a number of propositions which make a sort of codification of the law, the notes are very full, and all cases on the subject seem to be cited. If we had to make a comparison between Mr. Hamilton's and Mr. Palmer's works, we should say that Mr. Hamilton's is the more exhaustive and Mr. Palmer's the more critical. As an illustration of this we may call attention to the long and able criticism by Mr. Palmer of the case of *Bartlett v. Mugfair Property Co.*, of which he disapproves, but on which Mr. Hamilton makes no comment. Mr. Palmer has no hesitation

in giving his opinion on cases, or legislation, and we are glad that it is so, as his opinion is entitled to much respect. We are therefore sorry to read that the Directors' Liability Act, 1890, "undoubtedly, at first, frightened away some good directors; but the Companies Act, 1900, is much more likely to discourage good directors." Mr. Palmer adds an appendix containing the Companies Acts, Rules and Orders, Practice Directions, &c. We think it would add a little to the great value of his book if he would give the dates of all the cases cited.

*An Epitome of Leading Cases in Equity.* By W. H. HASTINGS KELKE, M.A. London: Sweet and Maxwell. 1901. This is written specially for the use of students, and aims at being an introduction to Equity Case Law. It is founded on White and Tudor's well-known selection, but it is in no case an abridgment of it, nor is it, we think, quite correctly entitled an epitome of Leading Cases. It, however, contains a good outline of equity, illustrated by a judicious selection of leading, and other cases. We have not been able to test its accuracy to any great extent, but we notice that the reference to *Burgess v. Vinicombe*, p. 33, is incorrect, as in that case the solicitor trustee-clause was held void because the trustee was an attesting witness to the will, not, as stated in the text, because he himself had drawn the will. The work is so short that it would not have appreciably increased the bulk, and would have rendered it much pleasanter to read, if the learned author had made use of more prepositions, and fewer abbreviations.

*Land Charges Acts, 1888 and 1900.* By ERNEST W. EATON and J. POYNTZ PURCELL. London: Stevens and Sons. 1901. This small work is well described by its sub-title "Practical Guide to Registration and Searches." It is the work of two gentlemen who are officials in the Land Charges Department of the Land Registry, and is intended for the use of "those who either (1) have to register under the Land Charges Registration and Searches Act, 1888, or the Land Charges Act, 1900; or (2) have, before completion of dealings, to make the necessary searches under these Acts." The book contains an introduction, information as to the various charges to be looked for, and other practical information, statutes, and forms. It is short, clear, and practical.

*Maritime Law.* BY ALBERT SAUNDERS. London: Effingham Wilson, 1901. This book might be entitled "Adventures of a most Unfortunate Ship." Mr. Saunders has hit upon the ingenious idea of illustrating Maritime Law by the history of a ship, which meets with almost every disaster which can be imagined, till at last she becomes a total loss. The plan is well adapted to show the application of the law to the facts, and to show what disputes and difficult questions may arise in the course of a ship's career, and the manner in which each disaster affects the different parties concerned or interested. Mr. Saunders shows a thorough grasp of the law, and a wide knowledge of the practical side of shipping. The sad tale begins with the agreement to build the s.s. *Malabar* at the cost of £30,000. We are rather surprised to find that she was built satisfactorily, and that neither party became bankrupt, nor was the ship burnt in the dock; nor did any legal questions arise, beyond a few trifling points as to registration caused by some of the owners dying, mortgaging, etc. The *Malabar* is delivered to owners at Newcastle-on-Tyne, and on the way to London runs into a German steamer and sinks her, with the loss of three passengers and six of the crew. The action *in rem* in the Admiralty Court then commences, results in a judgment that the *Malabar* was solely to blame, and the damages are found to be £32,000; the representatives of two drowned English passengers obtain verdicts for £6,000 and £4,500 respectively and the actions of the representatives of the drowned Germans are dismissed. Meanwhile the *Malabar* has gone off to China, and got there without any disaster except a considerable leakage of oil, part of her cargo. The owners are, however, successful in an action brought against them in respect of this, and, as far as we remember, it is the only action out of many in which they are successful. They, of course, have a collision in the Suez Canal and are found to blame. Space will not permit us to describe all the misfortunes of the *Malabar*, but we may mention a few more. She is blown on the rocks at the Mauritius, her cargo is condemned for contraband, she collides with another vessel in the English Channel, with loss of life on both sides, and at last sinks beneath the waves off Ushant. The number of questions that arise and have the law applied to them is very great, and the practical adjustment of the liabilities of all the parties concerned, in one way or another, is both difficult and instructive.

## NEW EDITIONS.

Third Edition. *Thomas's Leading Cases in Constitutional Law.*  
By CHARLES L. ATTENBOROUGH. London: Stevens and  
Haynes. 1901.

This book is intended for students, and contains a summary of between fifty and sixty important cases on Constitutional Law, with a short introduction, and notes on each group of cases. The idea is a good one, and the little work is interesting, as well as instructive. Some of the cases, such as those on Slavery, and we hope those on Impressment, only possess an historical interest; but many are still of vital importance.

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Third Edition. *Death Duty Acts.* By EVELYN FREETH.  
London: Shaw and Sons. 1901.

Mr. Freeth published the first edition of his work under the very reasonable supposition "that that part of the Finance Act, 1894, which relates to the Death Duties, including the new Estate Duty is not capable of being readily understood from a perusal of the Act." Since his second edition the law has been twice amended by Statute and explained by Judicial decisions. The need of a competent guide is therefore more imperative than ever, and we feel grateful to Mr. Freeth for bringing out a new Edition. The arrangement is excellent and the explanations and notes clear and practical. It contains the text of the four Finance Acts, and an appendix contains Forms, Rules, and other information.

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Sixth Edition. *The Law of Torts.* By SIR FREDERICK  
POLLOCK, BART. London: Stevens and Sons. 1901.

It is not necessary for us to say much about this well-known work. The Author is not only a lawyer but a jurist, and this work is distinguished above all others on the same subject, by its breadth of principle and clearness of style. The cases cited are not so numerous as in some other treatises, but they are carefully chosen, and include the most important and the most recent. Since the last edition the most important legal events in connection with the law of Torts have been the passing of the Workmen's Compensation Act, and the decision in *Allen v. Flood*.

The latter is frequently referred to with valuable comments on



what it has decided, and what it has suggested, but as pointed out by the Author, it has not only settled the law in some respects but unsettled it in others, and as regards one question at least "only the authority of the House of Lords can finally dispose of the doubts which still surround this topic. For the present they are rather increased than diminished." The Workmen's Compensation Act is but shortly dealt with, as being alien to the subject. "The decisions turn wholly on the language of the Act, and the rules made under it, and throw no light on any principle of the law of Torts; indeed the Act is a law of compulsory insurance, and quite beyond the region of actionable wrongs."

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Owing to want of space several reviews of important books have been held over, and will appear in next issue.

Other publications received—*Belgian Law and Legal Procedure*, by Gaston de Laval; Report of the Paris Conference (International Maritime Committee); Druce's *Agricultural Holdings Act, 1900*; *Bulletin* No. 61, New York State Library; Soule's *Year Book Bibliography*; Randolph's *Joint Resolution of Congress, U. S. A. and Cuba*; *The Register* (Japan); *The Journal of the Society of Comparative Legislation for June* (John Murray); *Quarterly Statement of Palestine Exploration Fund*; *The Royal Blue Book* (Kelly's Directories, Ltd.).

The *Law Magazine and Review* receives on exchanges with the following amongst other publications—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *North American Review*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico Legal Journal*, *Indian Review*, *Kathmandu Law Reports*, *The Lawyer* (India), *South African Law Journal*, *Yale Law Journal*, *New Jersey Law Journal*.

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